Supreme Court, U.S.
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No. 94

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General,

Petitioners,

v.

JATURUN SIRIPONGS,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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For Evidentiary Hearing; Respondent's
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APPENDIX A

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APPENDIX A

CERTIFIED FOR PUBLICATION

[Filed July 1, 1994]
[Amended October 13, 1994]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JATURUN SIRIPONGS, Petitioner-Appellant, v. ARTHUR CALDERON, Warden, Respondent-Appellee.	)	No. 92-56498 D.C. No. CV-89- 6530-WDK ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California, William D. Keller, District Judge, Presiding.

Argued and Submitted

October 21, 1993--Pasadena, California

Filed July 1, 1994

Amended October 13, 1994

Before: Mary M. Schoeder, Harry Pregerson, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Schroeder; Concurrence and Dissent by Judge Fernandez.

ORDER

The Opinion filed July 1, 1994, is amended as follows:

1. On slip opinion page 7183, delete the first full paragraph.

2. On slip opinion page 7183, modify the second full paragraph and last paragraph to read:

Basing a procedural default upon an ambiguous order that did not clearly rest on independent and adequate state grounds would defeat one of the primary goals of the plain statement rule: providing the state courts a means of avoiding federal court intrusion into state jurisprudence while ensuring federal court review of constitutional questions. See Long, 463

U.S. at 1041. We need not decide whether the California Supreme Court's order in this case rested with sufficient clarity upon the grounds for procedural bar set forth in the state's opposition. The district court's reliance on those grounds was misplaced for another reason, and one independent of the foregoing analysis.

The California Supreme Court has recently held that the procedural bars the state relied upon are discretionary and have not been applied consistently. In re Clark . . . .

With the foregoing amendments, the panel has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

OPINION

SCHROEDER, Circuit Judge:

The petitioner-appellant Jaturun Siripongs, a native of Thailand, was convicted of first-degree murder and sentenced to death for a violent robbery/double homicide in a Los Angeles Asian specialty food market. His state appeal and two state petitions for collateral relief were unavailing, and he unsuccessfully sought habeas relief in the district court. The critical issue in this appeal is whether he is entitled to an evidentiary hearing in the district

court on his claims of ineffective assistance of counsel.

It is undisputed that Siripongs' trial counsel put on no defense at the guilt phase of the trial. In addition, trial counsel conducted little or no investigation into the possibility of contending, either at the guilt phase or at the penalty phase, that the murders had been committed by an accomplice. Counsel conducted no inquiry into Siripongs' background in Thailand, where Siripongs was born, raised and lived until two years before the crimes in question. It is further undisputed that counsel had never before tried a capital case, and that counsel was running for Congress during most of the time that he should have been preparing the case for trial.

In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given

the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir. 1990); see Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir. 1992). Siripongs has never received an evidentiary hearing in state or federal court, and has raised a colorable claim. We therefore hold that Siripongs is entitled to an evidentiary hearing in order to develop the record on his ineffective assistance of counsel claims.

Siripongs presents a number of additional contentions of trial court error that require no further evidentiary development. We agree with the district court that these contentions do not warrant habeas corpus relief and otherwise affirm the judgment of the district court.

FACTS AND PROCEDURAL BACKGROUND

The evidence introduced against Siripongs at trial was all circumstantial but voluminous. The details are contained in the opinion of the California Supreme Court affirming the conviction and sentence. People v. Siripongs, 45 Cal. 3d 548, 754 P.2d 1306, 1309-13, 247 Cal. Rptr. 729 (Cal. 1988), cert. denied, 488 U.S. 1019 (1989). We only summarize.

Surachai ("Jack") and Packovan ("Pat") Wattanaporn owned the Pantai Market in Garden Grove, California. Quach Nguyen worked as a clerk at the market in December 1981. At approximately 2:00 p.m. on December 15, 1981, Jack Wattanaporn discovered the bodies of Pat Wattanaporn and Quach Nguyen on the floor of the storeroom of the market. Pat had been strangled to death, and Nguyen had died of multiple stab wounds. Pat had used the market storeroom to buy and sell jewelry.

Jewelry that Pat had been seen wearing on the day of the murders was missing from the crime scene.

Near the bodies was a letter addressed to a sister of Siripongs' girlfriend, Sainam Peung "Peung" Vecharungspri. The sister was known as "Noon." Evidence at trial established that Noon had placed the letter in her jacket, which she kept at Siripongs' house.

Siripongs arrived at Peung's house at 3 p.m. on the afternoon of December 15 with his fingers bandaged and bleeding. He claimed that he had cut himself at work that day. Later that afternoon Siripongs called a friend whom he owed money and asked the friend to help him sell some jewelry. This jewelry later was identified as belonging to Pat.

The following day Pat's purse was found in a dumpster some distance from the

market. The dumpster was a short distance from Peung's house in a shopping complex housing the laundromat used by Siripongs. Also in the dumpster were the jacket owned by Noon that had contained the letter found at the crime scene, a blood-stained shirt, and other incriminating articles, including a cord similar to a cord which was found wrapped around Nguyen's arm at the crime scene, hair that was consistent with Pat's hair, and items from the Pantai Market. An analysis of the blood stained items revealed that the blood on the items was consistent with Siripongs' blood, although a conclusive match could not be made.

Siripongs, who worked as an optical lens grinder, had not reported to work on the day of the murder. He returned to work on December 17th. Later that afternoon, Siripongs attempted to make a purchase using a credit card issued to

Jack Wattanaporn, and it was a credit check on that card which led to Siripongs' arrest. After his arrest, police discovered other credit cards issued to Pat and Jack in Siripongs' wallet.

Four hours after his arrest, Siripongs was allowed to make his first phone call, which he conducted in Thai. His conversation was recorded, on a concealed tape recorder, by an officer who stood next to Siripongs while he made the call. In the conversation, Siripongs asked Peung to go to his house to find and remove jewelry which had been worn by Pat and other items from the Pantai Market. A search of Siripongs' car and residence revealed more jewelry matching descriptions of Pat's jewelry, as well as department store receipts dated after her death but bearing her name.

At trial, Siripongs put forth no affirmative defense and called no

witnesses. Counsel's primary defense tactic was to cross examine the state's witnesses and criticize the state's evidence. Defense counsel's presentation at the penalty phase was very brief. Counsel called Siripongs' employer, who stated that the defendant was a good worker, and also called witnesses to testify that since his arrest, Siripongs had been a model prisoner. The defense presented no testimony from Siripongs' family or friends, although Siripongs' mother was present in the courtroom during the penalty phase.

The jury convicted Siripongs of murder and sentenced him to death. The California Supreme Court, on direct appeal, affirmed the conviction and sentence. People v. Siripongs, 45 Cal. 3d 548, 754 P.2d 1306, 247 Cal. Rptr. 729 (Cal. 1988). The United States Supreme Court denied certiorari. Siripongs v.

California, 488 U.S. 1019, 102 L. Ed. 2d 810, 109 S. Ct. 820 (1989).

Siripongs filed a petition for writ of habeas corpus, and an accompanying motion for discovery, in the California Supreme Court, raising, among other contentions, claims of ineffective assistance of trial counsel at the guilt and penalty phases. The petition was denied on the merits without a hearing.

Siripongs raised the ineffective assistance of counsel claims, and several additional claims, in his first federal court petition for writ of habeas corpus. The district court stayed the proceedings to permit Siripongs to exhaust the new claims in state court in a second state petition for collateral relief. In the second state petition, Siripongs raised claims of interpreter bias, trial judge bias and ineffective assistance of counsel

for counsel's failure to move for a mistrial on grounds of juror misconduct.

The California Supreme Court denied Siripongs' second petition without a hearing, stating in full: Petition for writ of habeas corpus DENIED both for reasons of procedural default and on the merits. Petitioner's motion for 'post-trial discovery' is denied People v. Gonzalez (1990) 51 Cal.3d 1179, 1261, 275 Cal. Rptr. 729, 800 P.2d 1159). The parties and amicus curiae have given the form of the California Supreme Court's order a great deal of attention in this appeal. The dispute is whether the California Supreme Court should be regarded as having foreclosed federal court litigation of the claims made in the second petition by disposing of them on an independent and adequate state ground.

Following the California Supreme Court's denial of the second petition,

Siripongs filed, in May 1991, a motion to conduct discovery in connection with his pending federal habeas petition. The district court granted Siripongs' motion to a limited extent, ordering that he be permitted to take the deposition of his trial counsel. Siripongs also sought an evidentiary hearing on his claims. The state opposed the motion for evidentiary hearing and moved for summary judgment. Siripongs' request for a hearing was supported by affidavits of expert witnesses as to the inadequacy of trial counsel's preparation and performance at both the guilt and penalty phases of the trial court proceedings. The district court did not hold a hearing, and, in October 1992, granted the state's motion for summary judgment and denied all of Siripongs' pending motions and requests for discovery. The district court granted Siripongs' request for a certificate of

probable cause and stayed his execution for the pursuit of this appeal.

INEFFECTIVE ASSISTANCE OF COUNSEL

Siripongs seeks an evidentiary hearing on his claims of ineffective assistance of counsel at both the guilt and penalty phases of his trial. As previously noted, these claims were summarily denied by the California Supreme Court in Siripongs' first state court habeas petition.

In district court, Siripongs' federally appointed counsel greatly supplemented the materials presented in support of his request for an evidentiary hearing. The materials included, in addition to the deposition of trial counsel, two detailed affidavits of potential expert witnesses. The first affidavit was that of an experienced public defender who reviewed the transcripts from the trial to assess the

adequacy of trial counsel's preparation and performance. The second affidavit was that of an anthropologist expert in Thai culture who explained the potential relevance of evidence of Siripongs' culture to the jury's deliberations during both the guilt and penalty phases.

The district court record also included the affidavit of a psychologist who originally examined Siripongs at the request of trial counsel to determine Siripongs' mental condition. This psychologist stood ready to testify at the penalty phase, and he explains that his testimony would have been beneficial in explaining petitioner's mental condition to the jury and making it less likely to sentence him to death. Trial counsel did not call this expert at the penalty phase.

Siripongs' principal contention on appeal is that he is entitled to an evidentiary hearing on his claim that

trial counsel's failure to investigate the existence of accomplices to the crime deprived him of effective assistance of counsel. The deposition of trial counsel establishes that counsel did not investigate or pursue the possibility that an accomplice was involved in the crime, even though he was of the belief, after interviewing his client before trial, that others were involved in the crime.

Apart from the expert affidavits, present counsel points to material in the trial court record supporting the claim of ineffectiveness. Specifically, counsel points to physical evidence suggesting that others were involved in the crime. For example, a strand of brown hair was found on the ring finger of one of the victims, which, according to the prosecution's witnesses, did not match the hair of either of the victims or Siripongs. Similarly, hair and blood,

which could not be identified as belonging to Siripongs or the victims, was found in the dumpster in which the police found items from the robbery. Clothing found in the dumpster after the crime, which was believed to have belonged to Siripongs, did not contain optical grinding material which would have been present on his clothing if he had worn the clothing to work. Five types of shoeprints were found at the crime scene, of which two have never been identified. Blood was found on both the front passenger and rear seats of Siripongs' car, as well as on the passenger kickplate, suggesting that more than one person was in Siripongs' car at the time the crime was committed. Siripongs was cut on both hands, injuries which according to prosecution witnesses, could have been defensive cuts if Siripongs had actually attempted to prevent the killings, as he now claims is

the case. Trial counsel did not meaningfully pursue or conduct any forensic testing on this evidence, and has not offered any explanation for his failure to do so. The district court granted summary judgment without permitting Siripongs to conduct any forensic testing.

There also is evidence in the record suggesting that a person by the name of Chartree Sakulsingh was involved in the crimes. A witness at trial had told investigating officers that he received a call from a Thai male who threatened to kill him if he testified about the murders. When asked who might have made the call, he implicated Chartree. In addition, associates of Siripongs, including his girlfriend Peung, Peung's sister Noon, and the boyfriend of another of Peung's sisters, provided conflicting stories about their whereabouts at the

time of the murders. For example, Peung told a police investigator that on the day of the crime, she picked up Noon at school at 2:00 p.m. Noon, however, told the police that although she went to school on that day, she became ill and left before 11:00 a.m. The whereabouts of the boyfriend of Peung's sister at the time of the crimes has never been accounted for.

Despite these leads, and despite his own belief that accomplices were involved, trial counsel did not pursue these leads and mounted no defense whatsoever beyond forensic attempts to maximize the state's burden of proof or point out possible inconsistencies in its evidence. Trial counsel had never before tried a capital case, and he now admits that he was distracted by campaigning for federal office.

The affidavit of expert defense counsel, submitted in connection with this

petition, explains in detail what competent counsel would have done to investigate the accomplice defense and explained why such a defense, if presented by competent counsel, might well have affected the jury's verdict. The expert opines that trial counsel's performance was deficient because, among other things, he failed to seek forensic testing of the physical evidence, failed to interview witnesses and otherwise follow up on leads indicating multiple involvement, and failed to present a complete picture of the defendant at the penalty phase.

The ultimate burden which must be borne if Siripongs is to succeed on his ineffective assistance of counsel claim, is to show both that trial counsel's performance was defective and a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. Strickland v.

Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The issue before us, however, is not whether Siripongs actually was deprived of his Sixth Amendment right to effective assistance of counsel, but only whether he is entitled to a hearing in order to try to establish that claim.

A petitioner in a capital case is entitled to an evidentiary hearing where there has been no state court evidentiary hearing and the petitioner raises a "colorable" claim of ineffective assistance. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir. 1990); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir. 1992). See also Morris v. California, 966 F.2d 448, 454 (9th Cir. 1991) (non-capital case; remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance),

cert. denied, 121 L. Ed. 2d 57, 113 S. Ct. 96 (1992). Cf. Shah v. United States, 878 F.2d 1156, 1159-60 (9th Cir.) (non-capital case; no evidentiary hearing required where petitioner's allegations as to counsel's advice are "patently frivolous and totally incredible."), cert. denied, 493 U.S. 869, 107 L. Ed. 2d 149, 110 S. Ct. 195 (1989). In Smith, the defendant initially pled not-guilty, but thereafter changed his plea to guilty and asked to be put to death. We held that the defendant was entitled to an evidentiary hearing, in a habeas proceeding, on his Sixth Amendment claim that counsel was ineffective in failing to seek a psychiatric evaluation to determine whether the defendant was competent to change his plea. Smith, 914 F.2d at 1170. In Hendricks, the defendant, after being sentenced to death for murdering two people, was granted an evidentiary hearing

on his claim that counsel was ineffective in failing to investigate and pursue a mental impairment defense. Hendricks, 974 F.2d at 1109-10.

Based on these authorities, and after reviewing the forensic evidence, the other evidence in the record, the expert affidavits, and the deposition of trial counsel in this case, we are convinced that Siripongs has presented at least a colorable claim of ineffective assistance of counsel. We note that the credibility and accuracy of the averments of the experts has never been materially questioned by the state or the district court. The district court nevertheless denied petitioner's request for an evidentiary hearing. The district court advanced two principal reasons.

The first was the court's acceptance of the contention by the state that counsel's decision not to pursue an

accomplice defense, indeed even to investigate such a defense, was justified as a "tactical" decision, because the mounting of such a defense would involve an admission that the defendant was at the crime scene at the time of the murders. This record, however, does not contain any evidence from which it can be inferred that trial counsel's decision not to mount a defense at trial was the result of an informed, tactical decision. The Supreme Court has observed that the trial process generally does not function properly "unless defense counsel has done some investigation into the prosecution's case and into various defense strategies." Kimmelman v. Morrison, 477 U.S. 365, 384, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986). The accomplice defense was trial counsel's only viable defense, and the existing record reflects that defense counsel did not investigate it adequately.

We held in Hendricks v. Vasquez, on a far leaner record than this, that an evidentiary hearing was required to determine whether counsel's failure to call any defense witnesses during the guilt phase of a death penalty conviction constituted deficient performance. We said that "without the benefit of an evidentiary hearing . . . we cannot determine if counsel's decision was a strategic one, and if so, whether the decision was a sufficiently informed one." Hendricks, 974 F.2d at 1109. Quoting Strickland v. Washington, we observed that strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." Id. at 1109-10. As in Hendricks, an evidentiary hearing is necessary in this case to establish, first, whether counsel's

decision not to pursue an accomplice defense was in fact a tactical decision, and, second, whether that decision was sufficiently informed.

Furthermore, even assuming the decision not to pursue an accomplice theory at the guilt phase was a tactical one, Siripongs has made at least a colorable claim that counsel's failure to pursue the accomplice defense amounted to deficient performance at the penalty phase of the trial. There is no apparent conceivable tactical advantage in refraining from contending at the penalty phase that someone else may have been responsible for the actual murders. As we stated in Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir. 1992), cert. denied, 122 L. Ed. 2d 742, 113 S. Ct. 1363 (1993), "to fail to present important mitigating evidence in the penalty phase - if there is no risk in doing so - can be as

devastating as a failure to present proof of innocence in the guilt phase."

The district court erred in granting summary judgment on the basis of the state's contention that the decision not to put on an accomplice defense was a sound tactical strategy in both the guilt and penalty phases.

The second reason why the district court granted summary judgment to the government without an evidentiary hearing on the accomplice defense was its view that such a defense would have been inherently incredible in light of Siripongs' refusal to come forward with the name of any accomplice. It is here, however, that the affidavit of the anthropologist reinforces Siripongs' claim by explaining how Siripongs' refusal to identify accomplices was consistent with deeply imbedded Thai cultural values, including cultural concepts of shame and

dishonor, and with Thai religious beliefs. Competent counsel undertaking to represent defendants with unique cultural backgrounds have an obligation at least to consider the effect of that background on their clients' conduct. Cf. Mak, 970 F.2d at 617-19. Without the benefit of an evidentiary hearing, we cannot conclude that Siripongs' failure to identify accomplices per se excused defense counsel from presenting, or at least investigating, an accomplice defense.

Respondent offers another basis for affirming the district court. Respondent contends that in light of the overwhelming evidence linking Siripongs to the scene of the crime, any deficient performance by counsel was not prejudicial because the jury would have rejected an accomplice defense and concluded that Siripongs actually committed the violent murders himself. Under similar circumstances, we

have observed that if a hearing is necessary on the question of deficient performance, it is generally likely that a hearing also will be required for determination of whether the alleged deficient performance probably influenced the outcome of the trial. See Hendricks, 974 F.2d at 1110. In this case, if the jury had found only that Siripongs participated in a robbery in which the murders occurred, Siripongs would not have been eligible for the death penalty. At the time of trial, an accomplice to a crime in which a death occurred could not receive the death penalty pursuant to a felony-murder statute if the defendant did not commit the murder or have the intent to kill. Enmund v. Florida, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). Without the benefit of an evidentiary hearing, and without a better sense of the potential strength of this defense, we

simply cannot conclude as a matter of law that there is no reasonable probability that pursuit of an accomplice defense would have left the jury with a reasonable doubt as to whether Siripongs committed the murders or intended that they occur.

Moreover, even if the accomplice theory had been pursued only at the penalty phase, it might have reduced the likelihood of a death sentence. Cf. Enmund, 458 U.S. at 794 (discussing reluctance of juries to impose death penalty for accomplice liability). In addition, under California law, a defendant may provide evidence of "residual doubt" as to his guilt during the penalty phase. People v. Johnson, 3 Cal. 4th 1183, 842 P.2d 1, 40-41 (Cal. 1992), cert. denied, 114 S. Ct. 114 (1993); People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (Cal.), cert. denied, 379 U.S. 866 (1964).

Presentation of accomplice evidence at the penalty phase could well have created such a doubt.

The claims of ineffective assistance of counsel are not limited to counsel's failure to pursue an accomplice theory. Affidavits in the record state that counsel was well below accepted standards in failing to conduct more than a cursory investigation of Siripongs' background and in making no attempt to humanize him before the jury. The affidavits of the anthropologist and expert defense counsel provide examples of evidence which should have been introduced at the penalty phase to humanize Siripongs before the jury. Mak, 970 F.2d at 619. Among other things, counsel could have introduced evidence of Siripongs' troubled childhood, his mother's efforts to keep his family together, and Siripongs' lack of any history of violent crime. Similarly,

evidence of Siripongs' Thai culture, including Thai concepts of remorse and shame, might well have bridged a cultural gap between the jury and the accused. Cf. Mak, 970 F.2d at 618-19, 620.

The only explanation offered for counsel's failure to put on any of this mitigating evidence, including testimony of Siripongs' mother who was present in the courtroom, was counsel's fear that such evidence would open the door to impeachment by evidence of Siripongs' prior involvement in a burglary in Thailand. However, the trial court ruled that so long as the mitigating evidence went to Siripongs' lack of a violent past and did not go to describe his moral character, the conviction would remain off limits as an impeachment device. As a caveat, the court noted that its ruling was tentative, and that if reliable evidence was produced showing that the

crimes were in fact violent, the court might reconsider. Apparently, this threat alone was sufficient to deter counsel from presenting the potentially significant mitigating evidence, even though counsel appears to have failed to investigate and determine whether the Thai offense involved violence.

Few aspects of representation can be more critical than understanding the client's criminal history. Counsel apparently lacked this understanding. The mitigating evidence counsel chose not to introduce, based on an inadequate understanding of his client's history, would undoubtedly have improved Siripongs' chances of receiving a life sentence rather than the death penalty. See Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (affirming district court's finding of deficient performance where counsel failed to present humanizing evidence at the

penalty phase, after an evidentiary hearing on claims remarkably similar to those in the instant case).

In sum, the district court should not have granted summary judgment to the government on Siripongs' claims of ineffective assistance of counsel at the guilt and penalty phases. Petitioner is entitled to an evidentiary hearing and the resolution of these claims by the district court on the basis of a fully developed factual record.

INTERPRETER BIAS

Siripongs seeks an evidentiary hearing on his claim of denial of due process, in which he alleges that an interpreter used in the trial court was, unbeknownst to defense counsel, a friend of one of the murder victims and her family, and therefore was biased against the defendant. The district court dismissed the claim on procedural grounds,

ruling that the claim could not be pursued in federal court because the California Supreme Court had denied relief on independent grounds of procedural default under state law. See Harris v. Reed, 489 U.S. 255, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989). We must therefore initially address whether the California Supreme Court's decision rested on an adequate and independent state ground so as to preclude federal relief.

This claim and two others were contained in Siripongs' second petition for writ of habeas corpus, which the California Supreme Court denied in a brief order, stating: Petition for writ of habeas corpus DENIED both for reasons of procedural default and on the merits. Petitioner's motion for "post trial discovery" is denied (People v. Gonzalez (1990) 51 Cal.3d 1179, 1261, 275 Cal. Rptr. 729, 800 P.2d 1159). The California

Supreme Court did not expressly state that each of the claims were denied on the basis of an independent procedural bar, nor did it identify any particular procedural rule upon which it relied for default.

The district court "placed great weight on respondent's opposition to petitioner's state habeas." That opposition discussed procedural bases for denying each of petitioner's claims and requested a finding of procedural default as to each. The district court concluded, on the basis of the opposition, which was not referred to in the California Supreme Court's order, that the Supreme Court did in fact decide that petitioner had procedurally defaulted on each of the claims on the grounds stated in the opposition.

The need to determine when a state court decision rests upon independent and

adequate state grounds so as to preclude an application for federal relief, has raised some thorny problems in recent years. If federal courts are to require a federal petitioner to exhaust state court remedies before seeking redress in the federal court, Rose v. Lundy, 455 U.S. 509, 515, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982), then federal courts should not permit a petitioner who has defaulted on his state remedies to pursue a claim in federal court. To do so would undermine the goal of ensuring that state courts have an opportunity to address federal claims in the first instance. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2554-55, 115 L. Ed. 2d 640 (1991); Rose, 455 U.S. at 515 (quoting Ex parte Royall, 117 U.S. 241, 251, 29 L. Ed. 868, 6 S. Ct. 734 (1886)); see Engle v. Isaac, 456 U.S. 107, 125 & n.28, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982). On the other hand, if a

petitioner has been denied relief in state court for any reason other than failure to pursue available state court remedies, there is a risk that a petitioner may be denied access to federal courts for a federal habeas corpus claim that Congress intended federal courts to decide. It is not always easy to determine why a state court denied a petitioner relief.

To help federal courts resolve these issues, in related situations involving direct review of state court decisions, the Supreme Court in Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), adopted a conclusive presumption that a state decision does not rest on an independent and adequate state law ground unless the decision states "clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds." Id. at 1041. Thus, unless the state court makes clear that it

is resting its decision denying relief on an independent and adequate state ground, it is presumed that the state denial was based at least in part upon federal grounds, and the petitioner may seek relief in federal court.

In Harris v. Reed, 489 U.S. 255, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989), the Court expressly adopted the Long presumption in federal habeas cases. The Supreme Court summarized in Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2557, 115 L. Ed. 2d 640 (1991): In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.

In this case, the California Supreme Court's order dealt with both the merits and the procedural posture of Siripongs' constitutional claims without identifying any particular procedural rule that completely barred any of them. The state's opposition to the petition raised a number of different bases for contending that the petitioner had waived each particular claim at issue, but the California Supreme Court did not indicate which, if any, it regarded as independent and adequate for dismissal. This is in contrast to Coleman itself, where the state had rested its argument solely upon a single procedural bar and the state court had obviously accepted its argument. See Coleman, 111 S. Ct. at 2559-61. This case also is distinguishable from Ylst v. Nunnemaker, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), in which the Supreme Court held that if there is a

reasoned decision by a state intermediate appellate court clearly denying a petition on procedural grounds, a subsequent ambiguous order of affirmance by the state supreme court will not lift the bar. As in Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992), cert. denied, 126 L. Ed. 2d 194, 114 S. Ct. 240 (1993), there is no such reasoned decision in this case.

Basing a procedural default upon an ambiguous order that did not clearly rest on independent and adequate state grounds would defeat one of the primary goals of the plain statement rule: providing the state courts a means of avoiding federal court intrusion into state jurisprudence while ensuring federal court review of constitutional questions. See Long, 463 U.S. at 1041. We need not decide whether the California Supreme Court's order in this case rested with sufficient clarity upon the grounds for procedural bar set

forth in the state's opposition. The district court's reliance on those grounds was misplaced for another reason, and one independent of the foregoing analysis.

The California Supreme Court has recently held that the procedural bars the state relied upon are discretionary and have not been applied consistently. In re Clark, 5 Cal. 4th 750, 855 P.2d 729 (Cal. 1993). We have recognized that such a state procedural rule cannot act as a bar to federal review. This is because the federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce. See Harmon v. Ryan, 959 F.2d 1457, 1461-63 (9th Cir. 1992); see also Johnson v. Mississippi, 486 U.S. 578, 587, 100 L. Ed. 2d 575, 108 S. Ct. 1981 (1988) ("a state procedural ground is

not adequate unless the procedural rule is strictly or regularly followed.")

As the dissent notes, the California Supreme Court, in Clark, announced strict new standards for determining whether successive state habeas petitions should be allowed. Clark, 855 P.2d at 760. Nevertheless, although subsequent petitions in California had, prior to Clark, never been condoned by the California courts, they clearly were often permitted as a matter of discretion. Id. at 740 ("on occasion, the merits of successive petitions have been considered regardless of whether the claim was raised on appeal or in a prior petition, and without consideration of whether the claim could and should have been presented in a prior petition."). Accordingly, while California procedural defaults for piecemeal claims after Clark may be non-discretionary, the strict standards

announced in that opinion did not guide the California courts in 1991, when Siripongs' state petition was denied.

We therefore conclude that, even if we assume that the State Supreme Court did in fact rely upon the procedural defaults asserted in the state's opposition to the petition, it did not rest its decision on the type of independent and adequate state ground that precludes federal review. The state alternatively contends in this appeal that, on the merits, the petitioner has failed to establish a sufficiently colorable claim to warrant an evidentiary hearing. It is to this contention that we now turn.

In order to establish a colorable claim of denial of due process in connection with the biased interpreter, Siripongs must show that the bias was sufficient to render the trial fundamentally unfair. Newton v. Superior

Court of California, 803 F.2d 1051, 1055 (9th Cir. 1986), cert. denied, 481 U.S. 1070, 95 L. Ed. 2d 873, 107 S. Ct. 2464 (1987); see Gaskins v. McKellar, 916 F.2d 941, 946-47 (4th Cir. 1990), cert. denied, 500 U.S. 961, 111 S. Ct. 2277, 114 L. Ed. 2d 728 (1991). Siripongs is not entitled to an evidentiary hearing merely because he suggests a basis for bias, he must raise at least an inference of prejudice. The difficulty with Siripongs' position is that, even assuming that the interpreter was biased and wished to influence the trial in a manner adverse to Siripongs' interests, Siripongs has not made out any colorable claim that the interpreter did influence the trial or even was in a position to do so.

Here, in contrast to the claims of ineffective assistance of counsel, we have no indication of what might have happened differently at trial had a completely

neutral interpreter been utilized. The interpreter acted as an interpreter for only four of the 46 witnesses called at trial, and three of those witnesses testified principally in English. The fourth testified as to facts that were not in dispute. There are no affidavits from any of the witnesses stating that the translation in the record varies from their recollections of their actual testimony in Thai. In addition, Siripongs himself was fluent in Thai and had some proficiency in English. He was present during the testimony, and he has not identified any testimony that was prejudicially mistranslated.

Apart from translation of testimony, Siripongs places great emphasis upon the fact that the translator mistranslated appellant's prior felony record in Thailand to indicate that the offense was a violent robbery rather than a theft.

However, in the absence of proof that violence was involved in the offense, the trial court treated the offense as a non-violent theft, and not a violent crime, thus effectively rejecting the translator's interpretation. Any alleged mistranslation by the interpreter of the defendant's criminal record was therefore immaterial to the proceeding.

There is also a contention that the translator communicated prejudicial information to the probation officer in completing the presentence report, but the nature of that information is not identified; the presentence report was circulated to trial counsel and is available to his habeas counsel as well. Moreover, the state trial court actually stated that it did not rely on the presentence report in imposing the death penalty.

Siripongs contends that other prejudicial material, in addition to the information provided by the interpreter, was contained in the presentence report. Because the trial court did not rely on the presentence report, this claim is rejected as well.

CLAIMED PROSECUTORIAL INTIMIDATION OF WITNESSES AT PENALTY PHASE

Siripongs claims that the trial court should have held a hearing on Siripongs' contention that the prosecutor intimidated Peung and Noon, who were potential penalty phase witnesses, and that prosecutorial intimidation prevented them from testifying.

Trial counsel informed the trial court that he had evidence that the prosecutor had told the two witnesses that the prosecutor thought the witnesses knew more about the crime than they were telling. This conversation allegedly was overheard by the potential witnesses'

stepfather. As an offer of proof, counsel offered to have the stepfather testify as to the nature of the conversation. Neither at trial nor in subsequent proceedings has Siripongs offered any additional information about the incident. The state court accepted the offer of proof but denied the motion for hearing because, on its face, a prosecutor telling a witness that the prosecutor believes the witness knows more than he or she is saying is not a threat or intimidation, and also because counsel offered only the testimony of the stepfather and not the testimony of the witnesses themselves. The trial court's decision not to hold a hearing or call a mistrial does not entitle the petitioner to habeas relief. While the prosecutor's comments may have been improper, they did not render the trial fundamentally unfair so as to constitute a denial of due process. See

Darden v. Wainwright, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986) (a prosecutor's misconduct does not warrant habeas relief unless it renders the trial fundamentally unfair).

INTERCEPTED PHONE CALL

Siripongs contends that the district court improperly granted summary judgment on his claim that the tape recording of his call from the jail to Peung was illegally obtained and should not have been admitted in the trial. The conversation was recorded by an officer standing nearby with a hidden recorder, not by use of a "tap" on the phone wire itself. Siripongs contends that the taping violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. §§ 2510-2521, as well as his constitutional rights to remain silent and to counsel.

Siripongs' constitutional contention is that the delay in providing him with telephone access and the surreptitious recording without Miranda warnings and after his request for counsel violated his Fifth and Sixth Amendment rights. Incriminating custodial statements are rendered inadmissible only if they are uttered in response to an act of coercion or interrogation, or the functional equivalent of interrogation. Rhode Island v. Innis, 446 U.S. 291, 300-02, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980). The mere fact of custody is insufficient to make an incriminating statement inadmissible. Because there was no coercion or interrogation in this case, other than the fact of custody, there was no constitutional violation. Arizona v. Mauro, 481 U.S. 520, 528-30, 95 L. Ed. 2d 458, 107 S. Ct. 1931 (1987) (permitting a person in custody to enter a situation in

which self-incrimination is "possible" with the hope that such self-incrimination will occur is not the functional equivalent of interrogation). The district court properly granted summary judgment on the constitutional claim.

Siripongs' statutory claim is that the taping of the phone call was an interception of a "wire" communication, which is unlawful if intercepted without consent or prior court authorization. 18 U.S.C. §§ 2510-21. If he is correct that the interception was of a wire communication, then he need not demonstrate that he entertained a reasonable expectation that his telephone call was private. United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973). He need only show that the communication was intercepted without consent or without a warrant. See 18 U.S.C. §§ 2511(2)(a)(ii) & (3), 2515. A reasonable expectation

that a communication is not subject to interception is required for protection under Title III if the interception is of an oral, as opposed to a wire, communication. Id.; 18 U.S.C. § 2510(2).

The district court correctly treated the communication as an oral communication. 18 U.S.C. § 2510(4) provides: "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. The police did not "intercept" a wire communication within the meaning of this statute because they acquired only what they recorded Siripongs saying into the mouthpiece, not what was transmitted over the wire. The reason there is no independent need to establish an expectation of privacy when "wire" communications are intercepted is because it is presumed that persons communicating

by wire expect that what goes over the line will be private. See Hall, 488 F.2d at 196. But there is no reason for presuming an expectation of privacy for statements made in the middle of police stations. It is there that Siripongs' conversation actually was intercepted. This interception was of an oral not a wire communication.

This holding is consistent with the Seventh Circuit's decision that an individual who overhears one side of a telephone conversation by standing next to the speaker has not intercepted a wire communication merely because the person was speaking into a telephone at the time of interception. United States v. McLeod, 493 F.2d 1186, 1188 (7th Cir. 1974); see also United States v. Carroll, 332 F. Supp. 1299, 1301 (D.D.C. 1971). There is no contrary authority.

Because the interception was of an oral communication, its admissibility was not prohibited unless Siripongs had a reasonable expectation that his communication would not be overheard. See 18 U.S.C. § 2510(2). The facts surrounding this claim were developed at a pretrial suppression hearing and are entitled to a statutory presumption of correctness. See 28 U.S.C. § 2254(d). They are not materially in dispute. Siripongs placed the call while a police officer was standing three feet away. A television camera was suspended from the ceiling about eight feet from the telephone and pointed toward the phone. These facts compel the district court's conclusion that Siripongs could not reasonably expect any privacy during his conversation. See In re John Doe Trader Number One, 894 F.2d 240, 243 (7th Cir. 1990); United States v. Harrelson, 754

F.2d 1153, 1169-70 (5th Cir.), cert. denied, 474 U.S. 908, 88 L. Ed. 2d 241, 106 S. Ct. 277, and cert. denied, 474 U.S. 1034, 88 L. Ed. 2d 578, 106 S. Ct. 599 (1985).

Because Siripongs conducted his conversation in Thai, he argues he reasonably believed that Officer Shave would not be able to understand him and that this created a reasonable expectation of privacy. Siripongs, of course, could not know for certain whether Officer Shave understood the conversation. More importantly, the statute protects an oral communication only if there is an expectation that the communication will not be intercepted, i.e., "acquired." 18 U.S.C. § 2510(2) & (4). The statute does not protect conversations that clearly are subject to interception merely because the conversation might not be immediately understood. As the Fifth Circuit has

noted in this context, "mistaking the degree of intrusion of which probable eavesdroppers are capable is not at all the same thing as believing there are no eavesdroppers." Harrelson, 754 F.2d at 1170.

Finally, even if there were a doubt about the admissibility of the recording, the evidence was cumulative because Noon, who was the recipient of the call, testified as to what the defendant said. Accordingly, we cannot conclude that admission of the recording was prejudicial in any meaningful way.

ADMISSION OF EVIDENCE FOUND IN SIRIPONGS' CAR

The state introduced incriminating blood stained items that were found in Siripongs' car. Siripongs contends that they were illegally seized because they were found only after he told the police where the car was when the police inquired for purposes of securing the car. The

district court, after reviewing the record of the trial court suppression hearing, concluded that the questioning officer knew that his questions on the location of the car were likely to elicit an incriminating response and requested supplemental briefing on whether the evidence would inevitably have been discovered.

If the state shows that items seized as a result of interrogation would have been discovered inevitably, the evidence is admissible despite any constitutional violation. Nix v. Williams, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984). The supplemental declarations submitted to the district court, which are not disputed, remove any doubt concerning the inevitable discovery of Siripongs' car. The car was found at the mall where Siripongs was arrested, and he had the keys to the car in his pocket. Through

information from the Department of Motor Vehicles, vehicle identification and owner identification were easily obtainable, and the officers would have sought this information. The police therefore inevitably would have discovered Siripongs' car and its contents.

SEARCH OF SIRIPONGS' WALLET

Siripongs contends that his Fourth Amendment rights were violated when police searched his wallet and elicited an incriminating denial that he did not steal one credit card in the wallet, implying that he did steal other credit cards in his wallet and belonging to one of the murder victims.

Fourth Amendment claims are not cognizable in federal habeas proceedings if a petitioner has had full and fair opportunity to litigate them in state court. Stone v. Powell, 428 U.S. 465, 481-82, 49 L. Ed. 2d 1067, 96 S. Ct. 3037

(1976). Siripongs had a full suppression hearing at trial, and does not contend otherwise. His contention that the state court on appeal did not understand his argument is misleading; Siripongs made his argument and it was rejected. Moreover, Siripongs' argument goes not to the fullness and fairness of his opportunity to litigate the claim, but to the correctness of the state court resolution, an issue which Stone v. Powell makes irrelevant. Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir. 1990).

JUROR MISCONDUCT

Before the penalty phase, trial counsel alerted the court to an incident of potential juror misconduct. Following the allegation, the court conducted a brief examination of one of the jurors outside the presence of the defendant. Siripongs contends that the hearing was inadequate because he was not present.

The absence of a defendant at a hearing violates due process only to the extent that a fair and just hearing cannot be held without the defendant present. United States v. Gagnon, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985) (per curiam). Here, at the request of trial counsel, the trial court conducted an in camera proceeding with one of the jurors to determine whether any misconduct had occurred. At the hearing, without the prosecutor or defense counsel present, the juror stated that she had asked her mother whether, when the defense counsel's table was cleared off, it meant that the defense was resting. According to the juror, her mother then asked her attorney what this meant, and the attorney told her that it probably meant that the defense was resting. The trial court, after questioning the juror, determined that the communication did not harm

Siripongs' case. Siripongs has not demonstrated how this hearing was unfair or that his presence at the hearing would conceivably have changed the result. Accordingly, the district court properly rejected this claim.

APPLICATION OF THE WITHERSPOON/WITT STANDARD IN VOIR DIRE

Siripongs next contends that the trial court applied the wrong standard on voir dire to weed out "death prone" jurors. Siripongs alleges this was error under Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968) and Wainwright v. Witt, 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985), which hold that a juror should be excluded for cause if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Witt, 469 U.S. at 424.

We assume, arguendo, that the trial court did employ the incorrect standard in determining which venire members would be stricken for cause. The appropriate inquiry under Witherspoon and Witt is whether the jury that is actually empaneled is impartial. Ross v. Oklahoma, 487 U.S. 81, 86, 101 L. Ed. 2d 80, 108 S. Ct. 2273 (1988). Siripongs has failed to demonstrate that any of the jurors actually empaneled were unduly prone to impose the penalty of death. It is immaterial that Siripongs may have been required to use preemptory challenges to excuse jurors that the trial court would have excused for cause had it employed the proper standard. Siripongs did not exhaust all of his preemptory challenges. Moreover, the loss of preemptory challenges is not a due process violation. Ross, 487 U.S. at 88; see J.E.B. v.

Alabama, ___ U.S. ___, 1994 U.S. Lexis 3121 at * 19 n.7 (April 19, 1994).

ERRONEOUS INSTRUCTIONS AT THE PENALTY PHASE

Siripongs raises a series of challenges to the death penalty jury instructions, some of which are joined in by amicus California Appellate Project. Under applicable California law, the jury was to arrive at its penalty verdict by weighing aggravating and mitigating circumstances, and it was so instructed. See Cal. Penal Code § 190.3. Two of the factors enumerated in the statute, and which the jury was instructed to consider were: "(a) the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true;" and "(b) the presence or absence of criminal activity by the defendant which involved the use or attempted use of force

or violence or the express or implied threat to use force or violence."

Siripongs contends that the jury was not instructed that in California, the circumstances of the underlying offense could be considered as only one aggravating circumstance, and that it was not told that it could find Siripongs' lack of a violent criminal record to be a mitigating factor. He claims the latter error was compounded by the prosecutor's ambiguous reference in closing argument that the jury could consider "past violent conduct," when the prosecution did not identify the conduct.

The jury was instructed in language that mirrored the statute. Siripongs' counsel offered no additional clarifying instructions, nor did he object to any comments by the prosecutor concerning the past criminal record.

The instruction to the jury that it "shall impose death" upon a finding that aggravating circumstances outweighed mitigating circumstances was upheld by the Supreme Court against an Eighth Amendment challenge in Boyde v. California, 494 U.S. 370 (1990). Siripongs, accompanied by California Appellate Project, makes a slightly different argument with respect to the "shall impose" instruction, pointing out that the California Supreme Court has consistently interpreted its Code to require imposition of the death penalty only if "death is the appropriate penalty under all the circumstances." People v. Duncan, 53 Cal. 3d 955, 810 P.2d 131, 143-44, 281 Cal. Rptr. 273 (Cal. 1991), cert. denied, 112 S. Ct. 1269 (1992); People v. Brown, 230 Cal. Rptr. 834, 726 P.2d 516, 532 (Cal. 1985), rev'd on other grounds, 479 U.S. 538 (1987).

We assume, arguendo, that Siripongs may have had a liberty interest in having the California courts apply its statutorily mandated procedures to him in the same manner as other defendants. See Fetterly v. Paskett, 997 F.2d 1295, 1299-1301 (9th Cir. 1993). The instructions as a whole, however, in this case did not mandate an improperly mechanical weighing process, or prevent the jury's exercise of discretion as Siripongs contends. The trial court tempered its "shall impose death" instruction by other instructions. For example, the jury was told it could take into account any mitigating factors, and that "any one [mitigating factor] may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case."

Some aspects of Siripongs' arguments in this regard, however, may be relevant

to the district court's consideration of his claim of ineffective assistance of counsel at the penalty phase. Of particular relevance may be counsel's failure to request an instruction that the defendant had no prior violent criminal record. That failing now appears to have been related to counsel's apparently mistaken refusal to call any character witnesses for fear of impeachment by a prior conviction. We are unable to conclude that any imperfections in the instructions themselves, however, independently or taken together, constituted plain constitutional error requiring us to order the district court to vacate the penalty phase determination.

CONCLUSION

The judgment of the district court dismissing the petition for habeas corpus is VACATED and the CASE REMANDED FOR EVIDENTIARY HEARING on appellant's claims

of ineffective assistance of counsel at the guilt and penalty phases of his trial. The ruling of the district court granting summary judgment for the state on Siripongs' remaining claims is AFFIRMED.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I dissent from the majority opinion on the issues discussed in this opinion. As to its other determinations, I concur.

A. Ineffective Assistance of Counsel.

I do not agree that an evidentiary hearing regarding ineffective assistance of counsel is required in this case. As I see it, Siripongs wants to have the district court and us engage in the kind of hindsight that the Supreme Court has warned against. See Strickland v. Washington, 466 U.S. 668, 689-90, 104 S.

Ct. 2052, 2065-66, 80 L. Ed. 2d 674 (1984).

Counsel viewed the state's case as a chain of circumstantial evidence. His strategy was to break the chain by showing that there was a reasonable doubt as to several of the links. That was for the purpose of showing that Siripongs was not even at the scene of the killing; that he, a non-violent, prayerful monk, was not a part of the robbery itself. The evidence developed at trial lent some support to that theory. That certainly appears to be reasonable under the circumstances and does not demonstrate ineffective assistance. But, says Siripongs, there was another strategy that was so superior that it should have been used. I do not agree.

The evidence against Siripongs was powerful; it resulted in a unanimous affirmance of his conviction and sentence

by the California Supreme Court. People v. Siripongs, 45 Cal. 3d 548, 247 Cal. Rptr. 729, 754 P.2d 1306 (1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 820, 102 L. Ed. 2d 810 (1989). Still, he now claims that despite the fact that his hands were cut, that clothing was found which was covered with blood which may have been his and that of a victim, that he had the stolen jewelry, that he had the victim's credit cards, and that he was trying to hide evidence, there might have been an accomplice, who really committed the murder. He says that counsel should have vigorously pursued that possibility. Of course, he never sought to identify the other supposed culprit (or, by some accounts, culprits) - he still has not identified him. In the face of all of this, and based on a marvelous display of second guessing by "experts," Siripongs says that there should have been an

attempt to push off the actual violent killing on a phantom accomplice. That accomplice would have been the person who did the dirty work while Siripongs, after fighting his violent friend in a vain attempt to save the victims, got to keep the loot. The accomplice defense would have been based upon essentially the same evidence that was developed at trial but would have placed Siripongs at the scene of the killing.

We are also told that there is nothing strange about that story, and that all would come clear if the jury had been told that Siripongs, an admitted participant in a robbery-killing, was simply following Thai culture and religion in not naming his phantom accomplice, who, we must remember, is the supposed killer of the victims. In other words, counsel, without help from his client, was supposed to have admitted that Siripongs was at the

scene, created a phantom unnamed accomplice, dubbed that accomplice the actual killer, presented Siripongs as an attempted savior of the victims, explained the keeping of the loot and other evidence of the crime, and pointed to the fact that Siripongs was an honorable person bound by his culture and religion to remain silent and stoic. Thus, it is said, Siripongs might have saved his own life. We are also told that when counsel failed to present that story, rather than the one he did, he was constitutionally ineffective. The district court was not impressed by that improbable scenario or by the conclusion which is said to follow from it. Neither am I. Certainly this hindsight defense does not so outstrip counsel's strategy as to permit a finding of ineffectiveness.

Siripongs' subsidiary claim that counsel did not understand the nature and

possible use of his prior burglary conviction in Thailand is, to my mind, a misstatement of the trial court record. It is perfectly clear that counsel himself convinced the state trial court that the Thai conviction was not a crime of violence. Still, counsel did not want to call family members to attempt to "humanize" Siripongs because counsel wanted no possibility of having the jury discover that there had been a prior conviction of that type. As the district court pointed out, even now the so-called humanizing evidence is "utterly unmoving." It seems to me that counsel could properly and competently decide that it was well worth excluding that evidence in order to assure the exclusion of references to the prior crime. No evidentiary hearing is needed to demonstrate that.

Finally, Siripongs points to the fact that this was counsel's first capital

case. I fail to see the significance of that, unless we are now supposed to infer that attorneys are incompetent when they try their first capital case, even though they may be otherwise experienced in the law. As it was, Siripongs' counsel had been a public defender for nine years and had extensive trial experience. He had handled robbery, rape and homicide trials, among others, and was certified as a criminal law specialist. To be precise, he had also taken a murder case to trial, but it had been resolved before the trial was completed.

Thus, the district court was not required to conduct an evidentiary hearing to explore the issues that Siripongs claims show that his attorney was incompetent.[1/]

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1. Also, I do not believe that the alleged instructional error demonstrates counsel's incompetence.

B. Interpreter Bias.

I also disagree with Siripongs' contention that there could have been no such thing as a procedural default in California because the default rules were not regularly followed. For that proposition Siripongs relies upon In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993), a case where, ironically enough, the California Supreme Court attempted to clear up any doubt about the force of its procedural default rules. The court did so because, as sometimes happens in law, uncertainties and misunderstandings had arisen.

In Clark, after first saying that its practice had been to reject piecemeal habeas corpus petitions, the court did say that procedural bars to second petitions had been "termed" discretionary and that prior cases had "suggested" that the court "may be willing to entertain multiple

collateral attacks." Id. at 768, 21 Cal. Rptr. 2d at 520, 855 P.2d at 740. However, the court stated that it had "never condoned abusive writ practice or repetitious collateral attacks on a final judgment." Id. at 769, 21 Cal. Rptr. 2d at 521, 855 P.2d at 741. Rather, it had placed restrictions upon repetitive attacks and had condemned them. Id. at 774, 21 Cal. Rptr. 2d at 525, 855 P.2d at 745. The court did say that there are certain exceptions. It said that it would "not be inflexible" but that absent justification a summary denial of successive petitions would follow if there were not allegations of "facts which, if proven, would establish that a fundamental miscarriage of justice occurred. . . ." Id. at 797, 21 Cal. Rptr. 2d at 540, 855 P.2d at 760. It then went on to define the standard that a petitioner must meet in order to show a fundamental

miscarriage. Id. at 797-98, 21 Cal. Rptr. 2d at 540-41, 855 P.2d at 760-61. In fine, Clark certainly does not justify our erasing the effect of California procedural default determinations for all cases prior to Clark. I fear we will live to rue the day that we did so.

Beyond that, it appears to me that California did, indeed, dispose of the interpreter bias claim on the alternative procedural default ground when it denied the petition both for reasons of procedural default and on the merits. I also think that we should respect that decision. See Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (state court may alternatively deny relief on merits of federal constitutional claim even after dismissing claim on procedural grounds), cert. denied, U.S. ___, 113 S. Ct. 1600, 123 L. Ed. 2d 163 (1993); Thomas v. Lewis, 945 F.2d 1119, 1123 (9th Cir.

1991) (claim was defaulted when state court found that petitioner had waived all the issues even though state court also discussed merits of claims); cf. Harris v. Reed, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 1044 n.10, 103 L. Ed. 2d 308 (1989) ("Moreover, a state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law."); Michigan v. Long, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will

not undertake to review the decision.")
(emphasis added).

I would uphold Siripongs' conviction in all respects. I would affirm the judgment of the district court. Thus, I concur for the most part, but dissent in part.

APPENDIX B

No. 94 - _____

APPENDIX B

CERTIFIED FOR PUBLICATION

[Filed July 1, 1994]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JATURUN SIRIPONGS, Petitioner-Appellant, v. ARTHUR CALDERON, Warden, Respondent-Appellee.	)	No. 92-56498 D.C. No. CV-89- 6530-WDK OPINION

Appeal from the United States District Court for the Central District of California, William D. Keller, District Judge, Presiding.

Argued and Submitted

October 21, 1993--Pasadena, California

Filed July 1, 1994

Before: Mary M. Schoeder, Harry Pregerson, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Schroeder; Concurrence and Dissent by Judge Fernandez.

OPINION

SCHROEDER, Circuit Judge:

The petitioner-appellant Jaturun Siripongs, a native of Thailand, was convicted of first-degree murder and sentenced to death for a violent robbery/double homicide in a Los Angeles Asian specialty food market. His state appeal and two state petitions for collateral relief were unavailing, and he unsuccessfully sought habeas relief in the district court. The critical issue in this appeal is whether he is entitled to an evidentiary hearing in the district court on his claims of ineffective assistance of counsel.

It is undisputed that Siripongs' trial counsel put on no defense at the guilt phase of the trial. In addition, trial counsel conducted little or no

investigation into the possibility of contending, either at the guilt phase or at the penalty phase, that the murders had been committed by an accomplice. Counsel conducted no inquiry into Siripongs' background in Thailand, where Siripongs was born, raised and lived until two years before the crimes in question. It is further undisputed that counsel had never before tried a capital case, and that counsel was running for Congress during most of the time that he should have been preparing the case for trial.

In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir. 1990); see Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir.

1992). Siripongs has never received an evidentiary hearing in state or federal court, and has raised a colorable claim. We therefore hold that Siripongs is entitled to an evidentiary hearing in order to develop the record on his ineffective assistance of counsel claims.

Siripongs presents a number of additional contentions of trial court error that require no further evidentiary development. We agree with the district court that these contentions do not warrant habeas corpus relief and otherwise affirm the judgment of the district court.

FACTS AND PROCEDURAL BACKGROUND

The evidence introduced against Siripongs at trial was all circumstantial but voluminous. The details are contained in the opinion of the California Supreme Court affirming the conviction and sentence. People v. Siripongs, 45 Cal. 3d 548, 754 P.2d 1306, 1309-13, 247 Cal.

Rptr. 729 (Cal. 1988), cert. denied, 488 U.S. 1019 (1989). We only summarize.

Surachai ("Jack") and Packovan ("Pat") Wattanaporn owned the Pantai Market in Garden Grove, California. Quach Nguyen worked as a clerk at the market in December 1981. At approximately 2:00 p.m. on December 15, 1981, Jack Wattanaporn discovered the bodies of Pat Wattanaporn and Quach Nguyen on the floor of the storeroom of the market. Pat had been strangled to death, and Nguyen had died of multiple stab wounds. Pat had used the market storeroom to buy and sell jewelry. Jewelry that Pat had been seen wearing on the day of the murders was missing from the crime scene.

Near the bodies was a letter addressed to a sister of Siripongs' girlfriend, Sainam Peung "Peung" Vecharungspri. The sister was known as "Noon." Evidence at trial established

that Noon had placed the letter in her jacket, which she kept at Siripongs' house.

Siripongs arrived at Peung's house at 3 p.m. on the afternoon of December 15 with his fingers bandaged and bleeding. He claimed that he had cut himself at work that day. Later that afternoon Siripongs called a friend whom he owed money and asked the friend to help him sell some jewelry. This jewelry later was identified as belonging to Pat.

The following day Pat's purse was found in a dumpster some distance from the market. The dumpster was a short distance from Peung's house in a shopping complex housing the laundromat used by Siripongs. Also in the dumpster were the jacket owned by Noon that had contained the letter found at the crime scene, a blood-stained shirt, and other incriminating articles, including a cord similar to a cord which

was found wrapped around Nguyen's arm at the crime scene, hair that was consistent with Pat's hair, and items from the Pantai Market. An analysis of the blood stained items revealed that the blood on the items was consistent with Siripongs' blood, although a conclusive match could not be made.

Siripongs, who worked as an optical lens grinder, had not reported to work on the day of the murder. He returned to work on December 17th. Later that afternoon, Siripongs attempted to make a purchase using a credit card issued to Jack Wattanaporn, and it was a credit check on that card which led to Siripongs' arrest. After his arrest, police discovered other credit cards issued to Pat and Jack in Siripongs' wallet.

Four hours after his arrest, Siripongs was allowed to make his first phone call, which he conducted in Thai.

His conversation was recorded, on a concealed tape recorder, by an officer who stood next to Siripongs while he made the call. In the conversation, Siripongs asked Peung to go to his house to find and remove jewelry which had been worn by Pat and other items from the Pantai Market. A search of Siripongs' car and residence revealed more jewelry matching descriptions of Pat's jewelry, as well as department store receipts dated after her death but bearing her name.

At trial, Siripongs put forth no affirmative defense and called no witnesses. Counsel's primary defense tactic was to cross examine the state's witnesses and criticize the state's evidence. Defense counsel's presentation at the penalty phase was very brief. Counsel called Siripongs' employer, who stated that the defendant was a good worker, and also called witnesses to

testify that since his arrest, Siripongs had been a model prisoner. The defense presented no testimony from Siripongs' family or friends, although Siripongs' mother was present in the courtroom during the penalty phase.

The jury convicted Siripongs of murder and sentenced him to death. The California Supreme Court, on direct appeal, affirmed the conviction and sentence. People v. Siripongs, 45 Cal. 3d 548, 754 P.2d 1306, 247 Cal. Rptr. 729 (Cal. 1988). The United States Supreme Court denied certiorari. Siripongs v. California, 488 U.S. 1019, 102 L. Ed. 2d 810, 109 S. Ct. 820 (1989).

Siripongs filed a petition for writ of habeas corpus, and an accompanying motion for discovery, in the California Supreme Court, raising, among other contentions, claims of ineffective assistance of trial counsel at the guilt

and penalty phases. The petition was denied on the merits without a hearing.

Siripongs raised the ineffective assistance of counsel claims, and several additional claims, in his first federal court petition for writ of habeas corpus. The district court stayed the proceedings to permit Siripongs to exhaust the new claims in state court in a second state petition for collateral relief. In the second state petition, Siripongs raised claims of interpreter bias, trial judge bias and ineffective assistance of counsel for counsel's failure to move for a mistrial on grounds of juror misconduct.

The California Supreme Court denied Siripongs' second petition without a hearing, stating in full: Petition for writ of habeas corpus DENIED both for reasons of procedural default and on the merits. Petitioner's motion for 'post-trial discovery' is denied People v.

Gonzalez (1990) 51 Cal.3d 1179, 1261, 275 Cal. Rptr. 729, 800 P.2d 1159).

The parties and amicus curiae have given the form of the California Supreme Court's order a great deal of attention in this appeal. The dispute is whether the California Supreme Court should be regarded as having foreclosed federal court litigation of the claims made in the second petition by disposing of them on an independent and adequate state ground.

Following the California Supreme Court's denial of the second petition, Siripongs filed, in May 1991, a motion to conduct discovery in connection with his pending federal habeas petition. The district court granted Siripongs' motion to a limited extent, ordering that he be permitted to take the deposition of his trial counsel. Siripongs also sought an evidentiary hearing on his claims. The state opposed the motion for evidentiary

hearing and moved for summary judgment. Siripongs' request for a hearing was supported by affidavits of expert witnesses as to the inadequacy of trial counsel's preparation and performance at both the guilt and penalty phases of the trial court proceedings. The district court did not hold a hearing, and, in October 1992, granted the state's motion for summary judgment and denied all of Siripongs' pending motions and requests for discovery. The district court granted Siripongs' request for a certificate of probable cause and stayed his execution for the pursuit of this appeal.

INEFFECTIVE ASSISTANCE OF COUNSEL

Siripongs seeks an evidentiary hearing on his claims of ineffective assistance of counsel at both the guilt and penalty phases of his trial. As previously noted, these claims were summarily denied by the California Supreme

Court in Siripongs' first state court habeas petition.

In district court, Siripongs' federally appointed counsel greatly supplemented the materials presented in support of his request for an evidentiary hearing. The materials included, in addition to the deposition of trial counsel, two detailed affidavits of potential expert witnesses. The first affidavit was that of an experienced public defender who reviewed the transcripts from the trial to assess the adequacy of trial counsel's preparation and performance. The second affidavit was that of an anthropologist expert in Thai culture who explained the potential relevance of evidence of Siripongs' culture to the jury's deliberations during both the guilt and penalty phases.

The district court record also included the affidavit of a psychologist

who originally examined Siripongs at the request of trial counsel to determine Siripongs' mental condition. This psychologist stood ready to testify at the penalty phase, and he explains that his testimony would have been beneficial in explaining petitioner's mental condition to the jury and making it less likely to sentence him to death. Trial counsel did not call this expert at the penalty phase.

Siripongs' principal contention on appeal is that he is entitled to an evidentiary hearing on his claim that trial counsel's failure to investigate the existence of accomplices to the crime deprived him of effective assistance of counsel. The deposition of trial counsel establishes that counsel did not investigate or pursue the possibility that an accomplice was involved in the crime, even though he was of the belief, after

interviewing his client before trial, that others were involved in the crime.

Apart from the expert affidavits, present counsel points to material in the trial court record supporting the claim of ineffectiveness. Specifically, counsel points to physical evidence suggesting that others were involved in the crime. For example, a strand of brown hair was found on the ring finger of one of the victims, which, according to the prosecution's witnesses, did not match the hair of either of the victims or Siripongs. Similarly, hair and blood, which could not be identified as belonging to Siripongs or the victims, was found in the dumpster in which the police found items from the robbery. Clothing found in the dumpster after the crime, which was believed to have belonged to Siripongs, did not contain optical grinding material which would have been present on his

clothing if he had worn the clothing to work. Five types of shoeprints were found at the crime scene, of which two have never been identified. Blood was found on both the front passenger and rear seats of Siripongs' car, as well as on the passenger kickplate, suggesting that more than one person was in Siripongs' car at the time the crime was committed. Siripongs was cut on both hands, injuries which according to prosecution witnesses, could have been defensive cuts if Siripongs had actually attempted to prevent the killings, as he now claims is the case. Trial counsel did not meaningfully pursue or conduct any forensic testing on this evidence, and has not offered any explanation for his failure to do so. The district court granted summary judgment without permitting Siripongs to conduct any forensic testing.

There also is evidence in the record suggesting that a person by the name of Chartree Sakulsingh was involved in the crimes. A witness at trial had told investigating officers that he received a call from a Thai male who threatened to kill him if he testified about the murders. When asked who might have made the call, he implicated Chartree. In addition, associates of Siripongs, including his girlfriend Peung, Peung's sister Noon, and the boyfriend of another of Peung's sisters, provided conflicting stories about their whereabouts at the time of the murders. For example, Peung told a police investigator that on the day of the crime, she picked up Noon at school at 2:00 p.m. Noon, however, told the police that although she went to school on that day, she became ill and left before 11:00 a.m. The whereabouts of the

boyfriend of Peung's sister at the time of the crimes has never been accounted for.

Despite these leads, and despite his own belief that accomplices were involved, trial counsel did not pursue these leads and mounted no defense whatsoever beyond forensic attempts to maximize the state's burden of proof or point out possible inconsistencies in its evidence. Trial counsel had never before tried a capital case, and he now admits that he was distracted by campaigning for federal office.

The affidavit of expert defense counsel, submitted in connection with this petition, explains in detail what competent counsel would have done to investigate the accomplice defense and explained why such a defense, if presented by competent counsel, might well have affected the jury's verdict. The expert opines that trial counsel's performance

was deficient because, among other things, he failed to seek forensic testing of the physical evidence, failed to interview witnesses and otherwise follow up on leads indicating multiple involvement, and failed to present a complete picture of the defendant at the penalty phase.

The ultimate burden which must be borne if Siripongs is to succeed on his ineffective assistance of counsel claim, is to show both that trial counsel's performance was defective and a reasonable probability that, but for the deficient performance, the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The issue before us, however, is not whether Siripongs actually was deprived of his Sixth Amendment right to effective assistance of counsel, but only whether he

is entitled to a hearing in order to try to establish that claim.

A petitioner in a capital case is entitled to an evidentiary hearing where there has been no state court evidentiary hearing and the petitioner raises a "colorable" claim of ineffective assistance. Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir. 1990); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir. 1992). See also Morris v. California, 966 F.2d 448, 454 (9th Cir. 1991) (non-capital case; remand for evidentiary hearing required where allegations in petitioner's affidavit raise inference of deficient performance), cert. denied, 121 L. Ed. 2d 57, 113 S. Ct. 96 (1992). Cf. Shah v. United States, 878 F.2d 1156, 1159-60 (9th Cir.) (non-capital case; no evidentiary hearing required where petitioner's allegations as to counsel's advice are "patently frivolous

and totally incredible."), cert. denied, 493 U.S. 869, 107 L. Ed. 2d 149, 110 S. Ct. 195 (1989). In Smith, the defendant initially pled not-guilty, but thereafter changed his plea to guilty and asked to be put to death. We held that the defendant was entitled to an evidentiary hearing, in a habeas proceeding, on his Sixth Amendment claim that counsel was ineffective in failing to seek a psychiatric evaluation to determine whether the defendant was competent to change his plea. Smith, 914 F.2d at 1170. In Hendricks, the defendant, after being sentenced to death for murdering two people, was granted an evidentiary hearing on his claim that counsel was ineffective in failing to investigate and pursue a mental impairment defense. Hendricks, 974 F.2d at 1109-10.

Based on these authorities, and after reviewing the forensic evidence, the other

evidence in the record, the expert affidavits, and the deposition of trial counsel in this case, we are convinced that Siripongs has presented at least a colorable claim of ineffective assistance of counsel. We note that the credibility and accuracy of the averments of the experts has never been materially questioned by the state or the district court. The district court nevertheless denied petitioner's request for an evidentiary hearing. The district court advanced two principal reasons.

The first was the court's acceptance of the contention by the state that counsel's decision not to pursue an accomplice defense, indeed even to investigate such a defense, was justified as a "tactical" decision, because the mounting of such a defense would involve an admission that the defendant was at the crime scene at the time of the murders.

This record, however, does not contain any evidence from which it can be inferred that trial counsel's decision not to mount a defense at trial was the result of an informed, tactical decision. The Supreme Court has observed that the trial process generally does not function properly - "unless defense counsel has done some investigation into the prosecution's case and into various defense strategies." Kimmelman v. Morrison, 477 U.S. 365, 384, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986). The accomplice defense was trial counsel's only viable defense, and the existing record reflects that defense counsel did not investigate it adequately.

We held in Hendricks v. Vasquez, on a far leaner record than this, that an evidentiary hearing was required to determine whether counsel's failure to call any defense witnesses during the guilt phase of a death penalty conviction

constituted deficient performance. We said that "without the benefit of an evidentiary hearing . . . we cannot determine if counsel's decision was a strategic one, and if so, whether the decision was a sufficiently informed one." Hendricks, 974 F.2d at 1109. Quoting Strickland v. Washington, we observed that strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." Id. at 1109-10. As in Hendricks, an evidentiary hearing is necessary in this case to establish, first, whether counsel's decision not to pursue an accomplice defense was in fact a tactical decision, and, second, whether that decision was sufficiently informed.

Furthermore, even assuming the decision not to pursue an accomplice

theory at the guilt phase was a tactical one, Siripongs has made at least a colorable claim that counsel's failure to pursue the accomplice defense amounted to deficient performance at the penalty phase of the trial. There is no apparent conceivable tactical advantage in refraining from contending at the penalty phase that someone else may have been responsible for the actual murders. As we stated in Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir. 1992), cert. denied, 122 L. Ed. 2d 742, 113 S. Ct. 1363 (1993), "to fail to present important mitigating evidence in the penalty phase - if there is no risk in doing so - can be as devastating as a failure to present proof of innocence in the guilt phase."

The district court erred in granting summary judgment on the basis of the state's contention that the decision not to put on an accomplice defense was a

sound tactical strategy in both the guilt and penalty phases.

The second reason why the district court granted summary judgment to the government without an evidentiary hearing on the accomplice defense was its view that such a defense would have been inherently incredible in light of Siripongs' refusal to come forward with the name of any accomplice. It is here, however, that the affidavit of the anthropologist reinforces Siripongs' claim by explaining how Siripongs' refusal to identify accomplices was consistent with deeply imbedded Thai cultural values, including cultural concepts of shame and dishonor, and with Thai religious beliefs. Competent counsel undertaking to represent defendants with unique cultural backgrounds have an obligation at least to consider the effect of that background on their clients' conduct. Cf. Mak, 970

F.2d at 617-19. Without the benefit of an evidentiary hearing, we cannot conclude that Siripongs' failure to identify accomplices per se excused defense counsel from presenting, or at least investigating, an accomplice defense.

Respondent offers another basis for affirming the district court. Respondent contends that in light of the overwhelming evidence linking Siripongs to the scene of the crime, any deficient performance by counsel was not prejudicial because the jury would have rejected an accomplice defense and concluded that Siripongs actually committed the violent murders himself. Under similar circumstances, we have observed that if a hearing is necessary on the question of deficient performance, it is generally likely that a hearing also will be required for determination of whether the alleged deficient performance probably influenced

the outcome of the trial. See Hendricks, 974 F.2d at 1110. In this case, if the jury had found only that Siripongs participated in a robbery in which the murders occurred, Siripongs would not have been eligible for the death penalty. At the time of trial, an accomplice to a crime in which a death occurred could not receive the death penalty pursuant to a felony-murder statute if the defendant did not commit the murder or have the intent to kill. Enmund v. Florida, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). Without the benefit of an evidentiary hearing, and without a better sense of the potential strength of this defense, we simply cannot conclude as a matter of law that there is no reasonable probability that pursuit of an accomplice defense would have left the jury with a reasonable doubt as to whether Siripongs committed the murders or intended that they occur.

Moreover, even if the accomplice theory had been pursued only at the penalty phase, it might have reduced the likelihood of a death sentence. Cf. Enmund, 458 U.S. at 794 (discussing reluctance of juries to impose death penalty for accomplice liability). In addition, under California law, a defendant may provide evidence of "residual doubt" as to his guilt during the penalty phase. People v. Johnson, 3 Cal. 4th 1183, 842 P.2d 1, 40-41 (Cal. 1992), cert. denied, 114 S. Ct. 114 (1993); People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (Cal.), cert. denied, 379 U.S. 866 (1964). Presentation of accomplice evidence at the penalty phase could well have created such a doubt.

The claims of ineffective assistance of counsel are not limited to counsel's failure to pursue an accomplice theory.

Affidavits in the record state that counsel was well below accepted standards in failing to conduct more than a cursory investigation of Siripongs' background and in making no attempt to humanize him before the jury. The affidavits of the anthropologist and expert defense counsel provide examples of evidence which should have been introduced at the penalty phase to humanize Siripongs before the jury. Mak, 970 F.2d at 619. Among other things, counsel could have introduced evidence of Siripongs' troubled childhood, his mother's efforts to keep his family together, and Siripongs' lack of any history of violent crime. Similarly, evidence of Siripongs' Thai culture, including Thai concepts of remorse and shame, might well have bridged a cultural gap between the jury and the accused. Cf. Mak, 970 F.2d at 618-19, 620.

The only explanation offered for counsel's failure to put on any of this mitigating evidence, including testimony of Siripongs' mother who was present in the courtroom, was counsel's fear that such evidence would open the door to impeachment by evidence of Siripongs' prior involvement in a burglary in Thailand. However, the trial court ruled that so long as the mitigating evidence went to Siripongs' lack of a violent past and did not go to describe his moral character, the conviction would remain off limits as an impeachment device. As a caveat, the court noted that its ruling was tentative, and that if reliable evidence was produced showing that the crimes were in fact violent, the court might reconsider. Apparently, this threat alone was sufficient to deter counsel from presenting the potentially significant mitigating evidence, even though counsel

appears to have failed to investigate and determine whether the Thai offense involved violence.

Few aspects of representation can be more critical than understanding the client's criminal history. Counsel apparently lacked this understanding. The mitigating evidence counsel chose not to introduce, based on an inadequate understanding of his client's history, would undoubtedly have improved Siripongs' chances of receiving a life sentence rather than the death penalty. See Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (affirming district court's finding of deficient performance where counsel failed to present humanizing evidence at the penalty phase, after an evidentiary hearing on claims remarkably similar to those in the instant case).

In sum, the district court should not have granted summary judgment to the

government on Siripongs' claims of ineffective assistance of counsel at the guilt and penalty phases. Petitioner is entitled to an evidentiary hearing and the resolution of these claims by the district court on the basis of a fully developed factual record.

INTERPRETER BIAS

Siripongs seeks an evidentiary hearing on his claim of denial of due process, in which he alleges that an interpreter used in the trial court was, unbeknownst to defense counsel, a friend of one of the murder victims and her family, and therefore was biased against the defendant. The district court dismissed the claim on procedural grounds, ruling that the claim could not be pursued in federal court because the California Supreme Court had denied relief on independent grounds of procedural default under state law. See Harris v. Reed, 489

U.S. 255, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989). We must therefore initially address whether the California Supreme Court's decision rested on an adequate and independent state ground so as to preclude federal relief.

This claim and two others were contained in Siripongs' second petition for writ of habeas corpus, which the California Supreme Court denied in a brief order, stating: Petition for writ of habeas corpus DENIED both for reasons of procedural default and on the merits. Petitioner's motion for "post trial discovery" is denied (People v. Gonzalez (1990) 51 Cal.3d 1179, 1261, 275 Cal. Rptr. 729, 800 P.2d 1159).

The California Supreme Court did not expressly state that each of the claims were denied on the basis of an independent procedural bar, nor did it identify any

particular procedural rule upon which it relied for default.

The district court "placed great weight on respondent's opposition to petitioner's state habeas." That opposition discussed procedural bases for denying each of petitioner's claims and requested a finding of procedural default as to each. The district court concluded, on the basis of the opposition, which was not referred to in the California Supreme Court's order, that the Supreme Court did in fact decide that petitioner had procedurally defaulted on each of the claims on the grounds stated in the opposition.

The need to determine when a state court decision rests upon independent and adequate state grounds so as to preclude an application for federal relief, has raised some thorny problems in recent years. If federal courts are to require a

federal petitioner to exhaust state court remedies before seeking redress in the federal court, Rose v. Lundy, 455 U.S. 509, 515, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982), then federal courts should not permit a petitioner who has defaulted on his state remedies to pursue a claim in federal court. To do so would undermine the goal of ensuring that state courts have an opportunity to address federal claims in the first instance. Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2554-55, 115 L. Ed. 2d 640 (1991); Rose, 455 U.S. at 515 (quoting Ex parte Royall, 117 U.S. 241, 251, 29 L. Ed. 868, 6 S. Ct. 734 (1886)); see Engle v. Isaac, 456 U.S. 107, 125 & n.28, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982). On the other hand, if a petitioner has been denied relief in state court for any reason other than failure to pursue available state court remedies, there is a risk that a petitioner may be

denied access to federal courts for a federal habeas corpus claim that Congress intended federal courts to decide. It is not always easy to determine why a state court denied a petitioner relief.

To help federal courts resolve these issues, in related situations involving direct review of state court decisions, the Supreme Court in Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), adopted a conclusive presumption that a state decision does not rest on an independent and adequate state law ground unless the decision states "clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds." Id. at 1041. Thus, unless the state court makes clear that it is resting its decision denying relief on an independent and adequate state ground, it is presumed that the state denial was based at least in part upon federal

grounds, and the petitioner may seek relief in federal court.

In Harris v. Reed, 489 U.S. 255, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989), the Court expressly adopted the Long presumption in federal habeas cases. The Supreme Court summarized in Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2557, 115 L. Ed. 2d 640 (1991): In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.

In this case, the California Supreme Court's order dealt with both the merits and the procedural posture of Siripongs' constitutional claims without identifying any particular procedural rule that

completely barred any of them. The state's opposition to the petition raised a number of different bases for contending that the petitioner had waived each particular claim at issue, but the California Supreme Court did not indicate which, if any, it regarded as independent and adequate for dismissal. This is in contrast to Coleman itself, where the state had rested its argument solely upon a single procedural bar and the state court had obviously accepted its argument. See Coleman, 111 S. Ct. at 2559-61. This case also is distinguishable from Ylst v. Nunnemaker, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), in which the Supreme Court held that if there is a reasoned decision by a state intermediate appellate court clearly denying a petition on procedural grounds, a subsequent ambiguous order of affirmance by the state supreme court will not lift the bar. As

in Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992), cert. denied, 126 L. Ed. 2d 194, 114 S. Ct. 240 (1993), there is no such reasoned decision in this case.

In addition to the fact that the California Supreme Court did not cite to any particular procedural rule, its invocation of "the merits" makes it impossible for us to conclude that the decision rests on independent and adequate state grounds. See Hunter, 982 F.2d at 347-48; Reid v. Senkowski, 961 F.2d 374, 377 (2d Cir. 1992). Moreover, the single case cited in the court's order, People v. Gonzalez, 51 Cal.3d 1179, 1261 (1990), cert. denied, 112 S. Ct. 117 (1991), holds that a habeas petitioner is not entitled to discovery unless he establishes a prima facie case for relief. The Court's reference to Gonzalez indicates the court based its decision more on the merits than on an independent procedural ground.

To find a procedural default from such an ambiguous order would defeat one of the primary goals of the plain statement rule; providing the state courts a means of avoiding federal court intrusion into state jurisprudence while ensuring federal court review of constitutional questions. See Long, 463 U.S. at 1041. Because the adequacy and independence of any possible state law ground for denial is not clear from the California Supreme Court's opinion, the district court should have reached the merits.

The district court's reliance on the grounds for procedural bar set forth in the state's opposition was misplaced for still another, reason, and one independent of the foregoing analysis.

The California Supreme Court has recently held that the procedural bars the state relied upon are discretionary and have not

been applied consistently. In re Clark, 5 Cal. 4th 750, 855 P.2d 729 (Cal. 1993). We have recognized that such a state procedural rule cannot act as a bar to federal review. This is because the federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce. See Harmon v. Ryan, 959 F.2d 1457, 1461-63 (9th Cir. 1992); see also Johnson v. Mississippi, 486 U.S. 578, 587, 100 L. Ed. 2d 575, 108 S. Ct. 1981 (1988) ("a state procedural ground is not adequate unless the procedural rule is strictly or regularly followed.")

As the dissent notes, the California Supreme Court, in Clark, announced strict new standards for determining whether successive state habeas petitions should be allowed. Clark, 855 P.2d at 760. Nevertheless, although subsequent

petitions in California had, prior to Clark, never been condoned by the California courts, they clearly were often permitted as a matter of discretion. Id. at 740 ("on occasion, the merits of successive petitions have been considered regardless of whether the claim was raised on appeal or in a prior petition, and without consideration of whether the claim could and should have been presented in a prior petition."). Accordingly, while California procedural defaults for piecemeal claims after Clark may be non-discretionary, the strict standards announced in that opinion did not guide the California courts in 1991, when Siripongs' state petition was denied.

We therefore conclude that, even if we assume that the State Supreme Court did in fact rely upon the procedural defaults asserted in the state's opposition to the petition, it did not rest its decision on

the type of independent and adequate state ground that precludes federal review. The state alternatively contends in this appeal that, on the merits, the petitioner has failed to establish a sufficiently colorable claim to warrant an evidentiary hearing. It is to this contention that we now turn.

In order to establish a colorable claim of denial of due process in connection with the biased interpreter, Siripongs must show that the bias was sufficient to render the trial fundamentally unfair. Newton v. Superior Court of California, 803 F.2d 1051, 1055 (9th Cir. 1986), cert. denied, 481 U.S. 1070, 95 L. Ed. 2d 873, 107 S. Ct. 2464 (1987); see Gaskins v. McKellar, 916 F.2d 941, 946-47 (4th Cir. 1990), cert. denied, 500 U.S. 961, 111 S. Ct. 2277, 114 L. Ed. 2d 728 (1991). Siripongs is not entitled to an evidentiary hearing merely because

he suggests a basis for bias, he must raise at least an inference of prejudice. The difficulty with Siripongs' position is that, even assuming that the interpreter was biased and wished to influence the trial in a manner adverse to Siripongs' interests, Siripongs has not made out any colorable claim that the interpreter did influence the trial or even was in a position to do so.

Here, in contrast to the claims of ineffective assistance of counsel, we have no indication of what might have happened differently at trial had a completely neutral interpreter been utilized. The interpreter acted as an interpreter for only four of the 46 witnesses called at trial, and three of those witnesses testified principally in English. The fourth testified as to facts that were not in dispute. There are no affidavits from any of the witnesses stating that the

translation in the record varies from their recollections of their actual testimony in Thai. In addition, Siripongs himself was fluent in Thai and had some proficiency in English. He was present during the testimony, and he has not identified any testimony that was prejudicially mistranslated.

Apart from translation of testimony, Siripongs places great emphasis upon the fact that the translator mistranslated appellant's prior felony record in Thailand to indicate that the offense was a violent robbery rather than a theft. However, in the absence of proof that violence was involved in the offense, the trial court treated the offense as a non-violent theft, and not a violent crime, thus effectively rejecting the translator's interpretation. Any alleged mistranslation by the interpreter of the

defendant's criminal record was therefore immaterial to the proceeding.

There is also a contention that the translator communicated prejudicial information to the probation officer in completing the presentence report, but the nature of that information is not identified; the presentence report was circulated to trial counsel and is available to his habeas counsel as well. Moreover, the state trial court actually stated that it did not rely on the presentence report in imposing the death penalty.

Siripongs contends that other prejudicial material, in addition to the information provided by the interpreter, was contained in the presentence report. Because the trial court did not rely on the presentence report, this claim is rejected as well.

CLAIMED PROSECUTORIAL INTIMIDATION OF WITNESSES AT PENALTY PHASE

Siripongs claims that the trial court should have held a hearing on Siripongs' contention that the prosecutor intimidated Peung and Noon, who were potential penalty phase witnesses, and that prosecutorial intimidation prevented them from testifying.

Trial counsel informed the trial court that he had evidence that the prosecutor had told the two witnesses that the prosecutor thought the witnesses knew more about the crime than they were telling. This conversation allegedly was overheard by the potential witnesses' stepfather. As an offer of proof, counsel offered to have the stepfather testify as to the nature of the conversation. Neither at trial nor in subsequent proceedings has Siripongs offered any additional information about the incident. The state court accepted the offer of

proof but denied the motion for hearing because, on its face, a prosecutor telling a witness that the prosecutor believes the witness knows more than he or she is saying is not a threat or intimidation, and also because counsel offered only the testimony of the stepfather and not the testimony of the witnesses themselves. The trial court's decision not to hold a hearing or call a mistrial does not entitle the petitioner to habeas relief. While the prosecutor's comments may have been improper, they did not render the trial fundamentally unfair so as to constitute a denial of due process. See Darden v. Wainwright, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986) (a prosecutor's misconduct does not warrant habeas relief unless it renders the trial fundamentally unfair).

INTERCEPTED PHONE CALL

Siripongs contends that the district court improperly granted summary judgment on his claim that the tape recording of his call from the jail to Peung was illegally obtained and should not have been admitted in the trial. The conversation was recorded by an officer standing nearby with a hidden recorder, not by use of a "tap" on the phone wire itself. Siripongs contends that the taping violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. §§ 2510-2521, as well as his constitutional rights to remain silent and to counsel.

Siripongs' constitutional contention is that the delay in providing him with telephone access and the surreptitious recording without Miranda warnings and after his request for counsel violated his Fifth and Sixth Amendment rights.

Incriminating custodial statements are rendered inadmissible only if they are uttered in response to an act of coercion or interrogation, or the functional equivalent of interrogation. Rhode Island v. Innis, 446 U.S. 291, 300-02, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980). The mere fact of custody is insufficient to make an incriminating statement inadmissible. Because there was no coercion or interrogation in this case, other than the fact of custody, there was no constitutional violation. Arizona v. Mauro, 481 U.S. 520, 528-30, 95 L. Ed. 2d 458, 107 S. Ct. 1931 (1987) (permitting a person in custody to enter a situation in which self-incrimination is "possible" with the hope that such self-incrimination will occur is not the functional equivalent of interrogation). The district court properly granted summary judgment on the constitutional claim.

Siripongs' statutory claim is that the taping of the phone call was an interception of a "wire" communication, which is unlawful if intercepted without consent or prior court authorization. 18 U.S.C. §§ 2510-21. If he is correct that the interception was of a wire communication, then he need not demonstrate that he entertained a reasonable expectation that his telephone call was private. United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973). He need only show that the communication was intercepted without consent or without a warrant. See 18 U.S.C. §§ 2511(2)(a)(ii) & (3), 2515. A reasonable expectation that a communication is not subject to interception is required for protection under Title III if the interception is of an oral, as opposed to a wire, communication. Id.; 18 U.S.C. § 2510(2).

The district court correctly treated

the communication as an oral communication. 18 U.S.C. § 2510(4) provides: "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. The police did not "intercept" a wire communication within the meaning of this statute because they acquired only what they recorded Siripongs saying into the mouthpiece, not what was transmitted over the wire. The reason there is no independent need to establish an expectation of privacy when "wire" communications are intercepted is because it is presumed that persons communicating by wire expect that what goes over the line will be private. See Hall, 488 F.2d at 196. But there is no reason for presuming an expectation of privacy for statements made in the middle of police stations. It is there that Siripongs'

conversation actually was intercepted. This interception was of an oral not a wire communication.

This holding is consistent with the Seventh Circuit's decision that an individual who overhears one side of a telephone conversation by standing next to the speaker has not intercepted a wire communication merely because the person was speaking into a telephone at the time of interception. United States v. McLeod, 493 F.2d 1186, 1188 (7th Cir. 1974); see also United States v. Carroll, 332 F. Supp. 1299, 1301 (D.D.C. 1971). There is no contrary authority.

Because the interception was of an oral communication, its admissibility was not prohibited unless Siripongs had a reasonable expectation that his communication would not be overheard. See 18 U.S.C. § 2510(2). The facts surrounding this claim were developed at a

pretrial suppression hearing and are entitled to a statutory presumption of correctness. See 28 U.S.C. § 2254(d). They are not materially in dispute. Siripongs placed the call while a police officer was standing three feet away. A television camera was suspended from the ceiling about eight feet from the telephone and pointed toward the phone. These facts compel the district court's conclusion that Siripongs could not reasonably expect any privacy during his conversation. See In re John Doe Trader Number One, 894 F.2d 240, 243 (7th Cir. 1990); United States v. Harrelson, 754 F.2d 1153, 1169-70 (5th Cir.), cert. denied, 474 U.S. 908, 88 L. Ed. 2d 241, 106 S. Ct. 277, and cert. denied, 474 U.S. 1034, 88 L. Ed. 2d 578, 106 S. Ct. 599 (1985).

Because Siripongs conducted his conversation in Thai, he argues he

reasonably believed that Officer Shave would not be able to understand him and that this created a reasonable expectation of privacy. Siripongs, of course, could not know for certain whether Officer Shave understood the conversation. More importantly, the statute protects an oral communication only if there is an expectation that the communication will not be intercepted, i.e., "acquired." 18 U.S.C. § 2510(2) & (4). The statute does not protect conversations that clearly are subject to interception merely because the conversation might not be immediately understood. As the Fifth Circuit has noted in this context, "mistaking the degree of intrusion of which probable eavesdroppers are capable is not at all the same thing as believing there are no eavesdroppers." Harrelson, 754 F.2d at 1170.

Finally, even if there were a doubt about the admissibility of the recording, the evidence was cumulative because Noon, who was the recipient of the call, testified as to what the defendant said. Accordingly, we cannot conclude that admission of the recording was prejudicial in any meaningful way.

ADMISSION OF EVIDENCE FOUND IN SIRIPONGS' CAR

The state introduced incriminating blood stained items that were found in Siripongs' car. Siripongs contends that they were illegally seized because they were found only after he told the police where the car was when the police inquired for purposes of securing the car. The district court, after reviewing the record of the trial court suppression hearing, concluded that the questioning officer knew that his questions on the location of the car were likely to elicit an incriminating response and requested

supplemental briefing on whether the evidence would inevitably have been discovered.

If the state shows that items seized as a result of interrogation would have been discovered inevitably, the evidence is admissible despite any constitutional violation. Nix v. Williams, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984). The supplemental declarations submitted to the district court, which are not disputed, remove any doubt concerning the inevitable discovery of Siripongs' car. The car was found at the mall where Siripongs was arrested, and he had the keys to the car in his pocket. Through information from the Department of Motor Vehicles, vehicle identification and owner identification were easily obtainable, and the officers would have sought this information. The police therefore

inevitably would have discovered Siripongs' car and its contents.

SEARCH OF SIRIPONGS' WALLET

Siripongs contends that his Fourth Amendment rights were violated when police searched his wallet and elicited an incriminating denial that he did not steal one credit card in the wallet, implying that he did steal other credit cards in his wallet and belonging to one of the murder victims.

Fourth Amendment claims are not cognizable in federal habeas proceedings if a petitioner has had full and fair opportunity to litigate them in state court. Stone v. Powell, 428 U.S. 465, 481-82, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976). Siripongs had a full suppression hearing at trial, and does not contend otherwise. His contention that the state court on appeal did not understand his argument is misleading; Siripongs made his

argument and it was rejected. Moreover, Siripongs' argument goes not to the fullness and fairness of his opportunity to litigate the claim, but to the correctness of the state court resolution, an issue which Stone v. Powell makes irrelevant. Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir. 1990).

JUROR MISCONDUCT

Before the penalty phase, trial counsel alerted the court to an incident of potential juror misconduct. Following the allegation, the court conducted a brief examination of one of the jurors outside the presence of the defendant. Siripongs contends that the hearing was inadequate because he was not present.

The absence of a defendant at a hearing violates due process only to the extent that a fair and just hearing cannot be held without the defendant present. United States v. Gagnon, 470 U.S. 522,

526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985) (per curiam). Here, at the request of trial counsel, the trial court conducted an in camera proceeding with one of the jurors to determine whether any misconduct had occurred. At the hearing, without the prosecutor or defense counsel present, the juror stated that she had asked her mother whether, when the defense counsel's table was cleared off, it meant that the defense was resting. According to the juror, her mother then asked her attorney what this meant, and the attorney told her that it probably meant that the defense was resting. The trial court, after questioning the juror, determined that the communication did not harm Siripongs' case. Siripongs has not demonstrated how this hearing was unfair or that his presence at the hearing would conceivably have changed the result.

Accordingly, the district court properly rejected this claim.

APPLICATION OF THE WITHERSPOON/WITT STANDARD IN VOIR DIRE

Siripongs next contends that the trial court applied the wrong standard on voir dire to weed out "death prone" jurors. Siripongs alleges this was error under Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968) and Wainwright v. Witt, 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985), which hold that a juror should be excluded for cause if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Witt, 469 U.S. at 424.

We assume, arguendo, that the trial court did employ the incorrect standard in determining which venire members would be stricken for cause. The appropriate inquiry under Witherspoon and Witt is

whether the jury that is actually empaneled is impartial. Ross v. Oklahoma, 487 U.S. 81, 86, 101 L. Ed. 2d 80, 108 S. Ct. 2273 (1988). Siripongs has failed to demonstrate that any of the jurors actually empaneled were unduly prone to impose the penalty of death. It is immaterial that Siripongs may have been required to use preemptory challenges to excuse jurors that the trial court would have excused for cause had it employed the proper standard. Siripongs did not exhaust all of his preemptory challenges. Moreover, the loss of preemptory challenges is not a due process violation. Ross, 487 U.S. at 88; see J.E.B. v. Alabama, ___ U.S. ___, 1994 U.S. Lexis 3121 at * 19 n.7 (April 19, 1994).

ERRONEOUS INSTRUCTIONS AT THE PENALTY PHASE

Siripongs raises a series of challenges to the death penalty jury instructions, some of which are joined in

by amicus California Appellate Project. Under applicable California law, the jury was to arrive at its penalty verdict by weighing aggravating and mitigating circumstances, and it was so instructed. See Cal. Penal Code § 190.3. Two of the factors enumerated in the statute, and which the jury was instructed to consider were: "(a) the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true;" and "(b) the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

Siripongs contends that the jury was not instructed that in California, the circumstances of the underlying offense could be considered as only one aggravating circumstance, and that it was

not told that it could find Siripongs' lack of a violent criminal record to be a mitigating factor. He claims the latter error was compounded by the prosecutor's ambiguous reference in closing argument that the jury could consider "past violent conduct," when the prosecution did not identify the conduct.

The jury was instructed in language that mirrored the statute. Siripongs' counsel offered no additional clarifying instructions, nor did he object to any comments by the prosecutor concerning the past criminal record.

The instruction to the jury that it "shall impose death" upon a finding that aggravating circumstances outweighed mitigating circumstances was upheld by the Supreme Court against an Eighth Amendment challenge in Boyde v. California, 494 U.S. 370 (1990). Siripongs, accompanied by California Appellate Project, makes a

slightly different argument with respect to the "shall impose" instruction, pointing out that the California Supreme Court has consistently interpreted its Code to require imposition of the death penalty only if "death is the appropriate penalty under all the circumstances." People v. Duncan, 53 Cal. 3d 955, 810 P.2d 131, 143-44, 281 Cal. Rptr. 273 (Cal. 1991), cert. denied, 112 S. Ct. 1269 (1992); People v. Brown, 230 Cal. Rptr. 834, 726 P.2d 516, 532 (Cal. 1985), rev'd on other grounds, 479 U.S. 538 (1987).

We assume, arguendo, that Siripongs may have had a liberty interest in having the California courts apply its statutorily mandated procedures to him in the same manner as other defendants. See Fetterly v. Paskett, 997 F.2d 1295, 1299-1301 (9th Cir. 1993). The instructions as a whole, however, in this case did not mandate an improperly

mechanical weighing process, or prevent the jury's exercise of discretion as Siripongs contends. The trial court tempered its "shall impose death" instruction by other instructions. For example, the jury was told it could take into account any mitigating factors, and that "any one [mitigating factor] may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case."

Some aspects of Siripongs' arguments in this regard, however, may be relevant to the district court's consideration of his claim of ineffective assistance of counsel at the penalty phase. Of particular relevance may be counsel's failure to request an instruction that the defendant had no prior violent criminal record. That failing now appears to have been related to counsel's apparently mistaken refusal to call any character

witnesses for fear of impeachment by a prior conviction. We are unable to conclude that any imperfections in the instructions themselves, however, independently or taken together, constituted plain constitutional error requiring us to order the district court to vacate the penalty phase determination.

CONCLUSION

The judgment of the district court dismissing the petition for habeas corpus is VACATED and the CASE REMANDED FOR EVIDENTIARY HEARING on appellant's claims of ineffective assistance of counsel at the guilt and penalty phases of his trial. The ruling of the district court granting summary judgment for the state on Siripongs' remaining claims is AFFIRMED.

ORDER

DISSENT: FERNANDEZ, Circuit Judge, concurring and dissenting:

I dissent from the majority opinion on the issues discussed in this opinion. As to its other determinations, I concur.

A. Ineffective Assistance of Counsel.

I do not agree that an evidentiary hearing regarding ineffective assistance of counsel is required in this case. As I see it, Siripongs wants to have the district court and us engage in the kind of hindsight that the Supreme Court has warned against. See Strickland v. Washington, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674 (1984).

Counsel viewed the state's case as a chain of circumstantial evidence. His strategy was to break the chain by showing that there was a reasonable doubt as to several of the links. That was for the purpose of showing that Siripongs was not even at the scene of the killing; that he,

a non-violent, prayerful monk, was not a part of the robbery itself. The evidence developed at trial lent some support to that theory. That certainly appears to be reasonable under the circumstances and does not demonstrate ineffective assistance. But, says Siripongs, there was another strategy that was so superior that it should have been used. I do not agree.

The evidence against Siripongs was powerful; it resulted in a unanimous affirmance of his conviction and sentence by the California Supreme Court. People v. Siripongs, 45 Cal. 3d 548, 247 Cal. Rptr. 729, 754 P.2d 1306 (1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 820, 102 L. Ed. 2d 810 (1989). Still, he now claims that despite the fact that his hands were cut, that clothing was found which was covered with blood which may have been his and that of a victim, that

he had the stolen jewelry, that he had the victim's credit cards, and that he was trying to hide evidence, there might have been an accomplice, who really committed the murder. He says that counsel should have vigorously pursued that possibility. Of course, he never sought to identify the other supposed culprit (or, by some accounts, culprits) - he still has not identified him. In the face of all of this, and based on a marvelous display of second guessing by "experts," Siripongs says that there should have been an attempt to push off the actual violent killing on a phantom accomplice. That accomplice would have been the person who did the dirty work while Siripongs, after fighting his violent friend in a vain attempt to save the victims, got to keep the loot. The accomplice defense would have been based upon essentially the same evidence that was developed at trial but

would have placed Siripongs at the scene of the killing.

We are also told that there is nothing strange about that story, and that all would come clear if the jury had been told that Siripongs, an admitted participant in a robbery-killing, was simply following Thai culture and religion in not naming his phantom accomplice, who, we must remember, is the supposed killer of the victims. In other words, counsel, without help from his client, was supposed to have admitted that Siripongs was at the scene, created a phantom unnamed accomplice, dubbed that accomplice the actual killer, presented Siripongs as an attempted savior of the victims, explained the keeping of the loot and other evidence of the crime, and pointed to the fact that Siripongs was an honorable person bound by his culture and religion to remain silent and stoic. Thus, it is said, Siripongs

might have saved his own life. We are also told that when counsel failed to present that story, rather than the one he did, he was constitutionally ineffective. The district court was not impressed by that improbable scenario or by the conclusion which is said to follow from it. Neither am I. Certainly this hindsight defense does not so outstrip counsel's strategy as to permit a finding of ineffectiveness.

Siripongs' subsidiary claim that counsel did not understand the nature and possible use of his prior burglary conviction in Thailand is, to my mind, a misstatement of the trial court record. It is perfectly clear that counsel himself convinced the state trial court that the Thai conviction was not a crime of violence. Still, counsel did not want to call family members to attempt to "humanize" Siripongs because counsel

wanted no possibility of having the jury discover that there had been a prior conviction of that type. As the district court pointed out, even now the so-called humanizing evidence is "utterly unmoving." It seems to me that counsel could properly and competently decide that it was well worth excluding that evidence in order to assure the exclusion of references to the prior crime. No evidentiary hearing is needed to demonstrate that.

Finally, Siripongs points to the fact that this was counsel's first capital case. I fail to see the significance of that, unless we are now supposed to infer that attorneys are incompetent when they try their first capital case, even though they may be otherwise experienced in the law. As it was, Siripongs' counsel had been a public defender for nine years and had extensive trial experience. He had handled robbery, rape and homicide trials,

among others, and was certified as a criminal law specialist. To be precise, he had also taken a murder case to trial, but it had been resolved before the trial was completed.

Thus, the district court was not required to conduct an evidentiary hearing to explore the issues that Siripongs claims show that his attorney was incompetent.[1/]

B. Interpreter Bias.

I also disagree with Siripongs' contention that there could have been no such thing as a procedural default in California because the default rules were not regularly followed. For that proposition Siripongs relies upon In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993), a case where, ironically enough, the California Supreme

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1. Also, I do not believe that the alleged instructional error demonstrates counsel's incompetence.

Court attempted to clear up any doubt about the force of its procedural default rules. The court did so because, as sometimes happens in law, uncertainties and misunderstandings had arisen.

In Clark, after first saying that its practice had been to reject piecemeal habeas corpus petitions, the court did say that procedural bars to second petitions had been "termed" discretionary and that prior cases had "suggested" that the court "may be willing to entertain multiple collateral attacks." Id. at 768, 21 Cal. Rptr. 2d at 520, 855 P.2d at 740. However, the court stated that it had "never condoned abusive writ practice or repetitious collateral attacks on a final judgment." Id. at 769, 21 Cal. Rptr. 2d at 521, 855 P.2d at 741. Rather, it had placed restrictions upon repetitive attacks and had condemned them. Id. at 774, 21 Cal. Rptr. 2d at 525, 855 P.2d at

745. The court did say that there are certain exceptions. It said that it would "not be inflexible" but that absent justification a summary denial of successive petitions would follow if there were not allegations of "facts which, if proven, would establish that a fundamental miscarriage of justice occurred. . . ." Id. at 797, 21 Cal. Rptr. 2d at 540, 855 P.2d at 760. It then went on to define the standard that a petitioner must meet in order to show a fundamental miscarriage. Id. at 797-98, 21 Cal. Rptr. 2d at 540-41, 855 P.2d at 760-61. In fine, Clark certainly does not justify our erasing the effect of California procedural default determinations for all cases prior to Clark. I fear we will live to rue the day that we did so.

Beyond that, it appears to me that California did, indeed, dispose of the interpreter bias claim on the alternative

procedural default ground when it denied the petition both for reasons of procedural default and on the merits. I also think that we should respect that decision. See Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (state court may alternatively deny relief on merits of federal constitutional claim even after dismissing claim on procedural grounds), cert. denied, U.S. ___, 113 S. Ct. 1600, 123 L. Ed. 2d 163 (1993); Thomas v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991) (claim was defaulted when state court found that petitioner had waived all the issues even though state court also discussed merits of claims); cf. Harris v. Reed, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 1044 n.10, 103 L. Ed. 2d 308 (1989) ("Moreover, a state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent

state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law."); Michigan v. Long, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.") (emphasis added).

I would uphold Siripongs' conviction in all respects. I would affirm the judgment of the district court. Thus, I concur for the most part, but dissent in part.

APPENDIX C

APPENDIX C

[Filed October 21, 1992]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JATURUN SIRIPONGS,	)	Case No.
	)	CV 89-6530 WDK
	)	
Petitioner,	)	ORDER RE: PETITION
	)	FOR WRIT OF HABEAS
	)	CORPUS;
vs.	)	PETITIONER'S MOTION
	)	FOR EVIDENTIARY
	)	HEARING;
Respondent.	)	RESPONDENT'S MOTION
	)	FOR SUMMARY
	)	JUDGMENT

I. INTRODUCTION

On July 9, 1990, petitioner Jaturun Siripongs filed a federal writ of habeas corpus raising a number of Constitutional challenges to his 1983 convictions in Orange County on two counts of first degree murder and his subsequent death sentence. In addition to two murder convictions, Siripongs was also found guilty of one count of robbery and one count of burglary. The jury found two

special circumstances -- multiple murder and murder during the commission of a robbery. Also, the jury found that Siripongs intended to kill both victims and that he used a deadly or dangerous weapon -- a knife -- in committing one of the murders, the burglary and the robbery. The convictions and sentence were subsequently upheld by the California Supreme Court. See People v. Siripongs, 45 Cal.3d 548, 247 Cal. Rptr. 729 (1988).

Presently before the Court are Siripongs' Petition for Writ of Habeas Corpus and his Motion for an Evidentiary Hearing, as well as respondent's Motion for Summary Judgment. For the reasons set forth below, petitioner's motion is DENIED and respondent's motion is GRANTED. Accordingly, petitioner's writ of habeas corpus is DENIED.

II. FACTS

The Murders

The murders took place at the Pantai Market, a small grocery store in Garden Grove. A Thai couple, Surachai ("Jack") and Packovan ("Pat") Wattanaporn, owned the market, with Pat serving as manager. Pat, who had a habit of wearing many pieces of expensive jewelry, also sold jewelry on the side. The market employed several part-time workers, including Quach Nguyen, a Vietnamese immigrant. Siripongs knew both Pat and Jack. During the summer of 1981, he worked at the market on occasional Sundays and was familiar with Pat's jewelry business.

Around 2 p.m. on December 15, 1981, the bodies of Pat and Nguyen were found at the Market. Pat had been strangled with ligature, while Nguyen had been stabbed at least ten times in the head and neck, plus he had several defensive slashes on his hands and arms. A cord was found wrapped around his upper arm. Parts of the market

were splattered with blood. The coroner estimated that Pat and Nguyen were killed between noon and 12:30 p.m.

Petitioner's Background

Siripongs was a Thai citizen who had lived in the United States for 2-3 years before the murders. He spent his first 29 years in Thailand. In December 1981, Siripongs was working as an optical grinder, a job he had held since January 1981.

At the time of the murders, Siripongs was romantically involved with a Thai woman, Peung, a former co-worker in Thailand. Siripongs spent considerable time with Peung and her family at their home in Cerritos. The family consisted of Peung's mother and stepfather Mr. and Mrs. Krell, her two younger sisters Noon and Nong, and her younger brother Deng. Siripongs had a habit of going to Peung's

home every day after he left work. He usually arrived between 4:00 and 5:00 p.m.

The Dumpster

The day after the murders, on December 16, 1981, evidence from the murders was found in a dumpster behind a small shopping center in Cerritos. The shopping center was very close to Peung's house. In fact, Siripongs and Peung's family used the laundromat in the shopping center on occasion.[1/] Among the items found in the dumpster were Pat's purse, a jacket identified as Noon's[2/], a bloodstained shirt and pants, bloodstained

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1. The washing machine at Peung's home was not working

2. Noon testified that she lived with Siripongs for 3-4 weeks in October/November 1981 following an argument with her stepfather. She identified the jacket as hers, but said she left it at Siripongs' house after she moved back home. The police found at the scene of the murder, a note to Noon from a school friend. Noon explained that the note had been in the pocket of the jacket.

tennis shoes in the defendant's size, socks, a serrated Robinson's knife with a broken tip, a Konekut knife with a 7 and 1/2 inch blade, a wadded bandanna containing a band aid wrapper and bloody paper towels, two pieces of cord, and several envelopes and deposit slips printed with the name "Pantai Market."

The Arrest

On the afternoon of December 17, 1981, Siripongs attempted to use the Wattanaporn's credit card at a JC Penney's store. The clerk, after learning that the card had been reported lost or stolen, requested further identification. Siripongs said his identification was in his car; he left and did not return.

Later that same afternoon, Siripongs tried to use another of the Wattanaporn's credit cards at a Sears store. This clerk also learned that the card had been stolen. She requested a driver's license.

Siripongs said he did not have one. At the clerk's request, Siripongs waited. In the meantime, the head of Sears' security discovered that the card had been taken during a double homicide. Several security officers approached Siripongs and if the card belonged to him. Siripongs admitted that it did not. The officers handcuffed Siripongs and detained him for possession of stolen property. Sears' security called the Westminister police because that was the location of the Sears store. The Garden Grove police were also called because the murders occurred in Garden Grove.

Officer Upstill, a Westminster police arrived and placed Siripongs under arrest for possession of a stolen credit. In processing the arrest, Upstill asked Siripongs his name. When Upstill could not understand him, Siripongs suggested that Upstill get his name from some

identification in his wallet. Because Siripongs was handcuffed to a chair, Upstill assisted him in retrieving his wallet from his pocket. In looking for Siripongs name in the wallet, Upstill noticed several credit cards with the Wattanaporn name and a gold chain, which was later identified as belonging to Pat. Upstill also found a credit card in the name of Behrooz Nikkou. Upon seeing that card, Siripongs stated: "Sir, I did not steal that card. It come in the mail to my house. I keep that card, sir. That card I no steal."

Upstill, as was his habit in addressing suspects arrested at the shopping mall, told Siripongs that his car would be left unattended in the parking lot and that if he wanted to lock it or retrieve anything from it, he should tell Upstill. Siripongs asked to get his girlfriend's picture from the car and

directed Upstill to the location. The police subsequently used the car license plate number to obtain Siripongs' home address and to obtain search warrants for his home and car.

After booking Siripongs at the Westminster police station, Upstill released him to the Garden Grove police who booked him for murder. At the police station, Siripongs requested an attorney. The investigation officer did not try to question Siripongs, nor did he advise him of his Miranda rights.

The Evidence Against Siripongs - The Search

The evening of his arrest, Siripongs asked to make two telephone calls. Siripongs was allowed to use a telephone on the wall of a corridor in the police station. An officer asked Siripongs what number he wished to call and then dialed it for him. A video camera was present above the phone. The officer recorded

Siripongs' side of the conversation using a tape recorded hidden on his pocket. Siripongs' conversation was in Thai, which the officer did not understand. After finishing his Siripongs declined an offer of a second phone call because he did not remember the phone number.

The police asked Jack to translate Siripongs' conversation. Through Jack's translation, the police learned that the call was placed to Peung and Noon. Siripongs directed them to go to his house and remove certain items. He also told Noon to get money from someone named Chusit. He insisted that they do what he said and do it immediately. Peung's mother, however, refused to let them go because it was after midnight and very foggy.

At the time Jack was translating the tape, the police were searching Siripongs' home pursuant to a search warrant. Upon

learning what objects Siripongs had asked Peung and Noon to retrieve, the police seized those items and found many pieces of jewelry later identified as belonging to Pat. The police also found credit receipts in Pat's name dated after the murders and a paper on which someone had practiced signing Pat's name.

The next day the police searched Siripongs' car. They found many blood stains, a Pantai Market bank book, credit card receipts, and a watch later identified as belonging to Pat.

The Evidence Against Siripongs - His Whereabouts

Siripongs did not go to work on December 15, the day of the murders, nor on December 16. On one of those days Siripongs called in sick. On the other day, Noom called in sick for him.

On December 15, Siripongs arrived at Peung's house at about 3:00 p.m., an hour earlier than usual. When Siripongs drove

up to the house, Deng was washing a car. Siripongs asked him to wash his floor mats, which Deng did.

Siripongs had bandages on several of his fingers when he arrived at Peung's house. Upon questioning by Peung and her family, Siripongs said he cut his fingers at work that day.[3/]

Later that same evening, Siripongs accompanied Peung to Hollywood where Peung was to babysit for relatives. While Peung babysat, Siripongs went to the Siam bookstore to meet his friend, Chusit. Siripongs gave Chusit nine pieces of

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3. Siripongs did not work on December 15, the day he said he cut his fingers. When he went to work on December 17, his employer questioned him about the cuts and bandages. Siripongs told his employer that his girlfriend's sister had attempted suicide with a knife, and he cut himself while trying to get the knife away. Peung's sister denied making any suicide attempts or even engaging in a struggle with Siripongs over a knife.

jewelry to sell. Siripongs told him that the jewelry belonged to an acquaintance, Sang, who needed to sell the jewelry in order to get money to return to Thailand. Siripongs owed Chusit $1000 and told him he could keep a portion of the sale proceeds as a commission.

Chusit never sold the jewelry. Siripongs called Chusit after his arrest. Chusit asked how to return the jewelry to Sang. Siripongs told him to get the information from Noon. Noon however, told Chusit that she had never heard of Sang. Chusit eventually gave the jewelry to the police. Eight of the nine pieces of jewelry were identified as belonging to Pat.

<u>The Evidence Against Siripongs - The Physical Evidence</u>

One shoeprint at the scene generally matched the shoeprint of the bloody shoe found in the dumpster. The pants found in the dumpster had several blood stains,

some consistent with Nguyen's blood and some consistent with Siripongs' blood. The shirt from the dumpster had blood stains consistent with Siripongs' blood. Siripongs blood was also found on the cord from the dumpster. Furthermore, the cord from the dumpster matched the cord found around Nguyen's arm.

The Defense

At trial, the defense presented no evidence, choosing instead to challenge the sufficiency of the State's case. The jury deliberated one day before returning verdicts.

The Penalty Phase

The prosecution did not present any additional evidence at the penalty phase. Siripongs called seven witnesses. Siripongs' employer discussed Siripongs' work history. An Orange County district attorney and a Santa Ana police officer acknowledge Siripongs' cooperation in

investigating and prosecuting a person who robbed Siripongs when he was a clerk at a convenience store in December 1980. Three Orange County deputy sheriffs testified that Siripongs was a good prisoner who did not cause trouble and who volunteered for work assignments. A fellow inmate described Siripongs as a good friend and a model inmate who never caused any trouble. The jury deliberated for one day before returning a verdict of death.

III. DISCUSSION

A. Procedurally Barred Claims.

Before turning to the instant motions, this Court must determine whether any of petitioner's procedurally barred claims will be excused. In an order dated August 27, 1991, this Court found that three of petitioner's claims (interpreter bias, trial judge bias, and

ineffective assistance of counsel for failure to file a motion for mistrial) were procedurally barred because the California Supreme Court relied on state procedural grounds in denying petitioner's state habeas petition raising these claims. This Court can only entertain claims which are procedurally barred when a petitioner demonstrates cause and prejudice or a fundamental miscarriage of justice. Coleman v. Thompson, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). Cause requires some showing that "the factual or legal basis for a claim was not reasonably available to counsel or that some interference by officials made compliance impractical." Murray v. Carrier, 477 478, 488 (1986). Examples of cause include ineffective assistance of counsel at a time when the defendant is Constitutional entitled to counsel, but not an attorney's tactical decision not to present a claim.

Id. To satisfy the prejudice component, petitioner must show that the claimed error "worked to his actual and substantial disadvantage, infecting his trial with error of constitutional dimension." United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original).

A fundamental miscarriage of justice exists only in those rare instances in which a petitioner can demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. With these precepts in mind, the Court now turns to petitioner's claims.

1. Interpreter Bias.

Petitioner first claims that the Thai interpreter employed during his trial, Rabin Sinskul, was biased against him because he was a friend of the victim Pat and her family. Petitioner further

asserts that he did not become aware of the translator's relationship with the victim until after his trial and direct appeal. Petitioner contends that as a result of the bias, Sinskul wrongly translated the statements of the various witnesses for whom he interpreted, the tape of petitioner's call from jail, and petitioner's rap sheet. In addition, petitioner alleges that Sinskul made prejudicial comments to the probation officer.

This claim fails for two reasons. First, petitioner's basic objection is that Sinskul conflict of interest led to a faulty interpretation. It is clear from the record that petitioner, who speaks and understands both Thai and English, alerted his trial attorney, James Spellman, to alleged deficiencies in Sinskul's translations. As a result, Spellman repeatedly objected to Sinskul's

interpretation starting with Sinskul's first appearance at the preliminary hearing and continuing regularly thereafter. Put simply, petitioner was always on notice that he had a potential claim against Sinskul for faulty interpretation. That petitioner has now uncovered a possible cause for Sinskul's alleged errors does not excuse petitioner's failure to raise the issue of the interpreter's competence in his direct appeal. Second, and more importantly, even assuming Sinskul was biased against petitioner, there is no evidence of actual prejudice given the relatively insignificant role played by Sinskul. Sinskul provided complete translations for only two minor witnesses: the doughnut shop owner and Deng, both of whom testified to peripheral matters. Sinskul assisted, minimally, Peung and her mother. The majority of Sinskul's aid was to spell

English versions of Thai names. Sinskul did provide more assistance to Noon. Noon, who could communicate in English, reported to the court that she had no real problems with Sinskul's translations and, indeed, found them helpful.

As for Sinskul's translations of the phone call and rap sheet, once again, no prejudice can be found. The trial judge allowed Spellman to hire another interpreter to translate the phone call. The judge compared the translations prepared by the defense interpreter and Sinskul and allowed both parties to question both interpreters. In the end, the judge did not allow any written translations to be given to the jury. Finally, the judge allowed Spellman to challenge any of Sinskul's translations by calling his own interpreter as a witness, something which Spellman declined to do.

Similarly, while it appears that Sinskul may have misinterpreted Siripongs' rap sheet, there was no harm done. Spellman corrected the error by having a translation made of the Thai penal code. After that, the trial judge concluded that Siripongs' Thai crime did not involve violence. As such, there was no resulting prejudice.

Lastly, petitioner alleges that Sinskul made a number of prejudicial remarks to the probation officer. There is no indication, however, that these statements played any role in the judge's sentencing decision. Significantly, petitioner cannot point anywhere in the record where the trial judge evidenced the slightest reliance on Sinskul's alleged comments. In fact, the trial judge specifically stated at sentencing that he was relying upon the evidence presented at trial.

For all these reasons, petitioner has failed to show cause and prejudice. Because the evidence against petitioner at trial was overwhelming, there is no possibility that these alleged incidents resulted in a fundamental miscarriage of justice.

2. Trial Judge Bias.

Petitioner cites several instances where the trial judge bias is even more unpersuasive. Petitioner cites several instances where the trial judge made "prejudicial" comments about Siripongs. The first instance occurred when Siripongs' attorney objected to the prosecutor's use of several police reports that had not been provided to him. One of the reports indicated that the shoes found in the dumpster were the same size as shoes found in Siripongs' apartment. The trial judge said:

The only issue I can see is the obvious surprise that Mr. Spellman was taken when McLean said that he had measured both shoes and that they were both approximately nine inches, which indicates if the shoe fits, wear it. . . . I have a general feeling in these kinds of cases if the shoe fits, the defendant should wear it and I feel it's very significant in light of the plethora of evidence that it is overwhelming against the defendant to this stage that has been brought out by the people. . . .

Later, during a jury instruction discussion in chambers, the judge said:

What is the point of having a finding of use of a deadly or dangerous weapon as to the two

> murders? It certainly doesn't enhance it. We're not going to give him an extra year after we kill him.[4]

At Siripongs' hearing on his motion for modification of the verdict, the judge said:

> It is the Court's fervent hope that your appeals will be denied and that you actually will be put to death for the crimes that you have committed.

Finally, at a hearing on May 18, 1990 setting an execution date, the judge observed that Siripongs "was a long way from actually sitting in that chair" and told Siripongs' current counsel to tell Siripongs that he said to " have a nice day."

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4. This isolated comment, made in the privacy of chambers, was in poor taste. However, it in no way eviscerates the even-handed manner in which the judge conducted the trial.

Even assuming these comments indicate judicial bias -- which this Court does not believe in view of the totality of the trial court's conduct -- petitioner's counsel has utterly failed to shoe why petitioner was unaware of the trial judge's supposed bias. With the exception of the May 18, 1990 comment, the other comments were in the record and available to petitioner's appellate counsel for use in petitioner's direct appeal. Petitioner's claim that he was not put on notice of the trial judge's alleged bias until the May 18, 1990 hearing simply does not comport with the facts. Accordingly, no finding of cause or prejudice is warranted here. Again, the overwhelming evidence against petitioner precludes any finding of a fundamental miscarriage of justice.

3. Ineffective Assistance of Counsel: Failure to File a Motion For Mistrial.

Petitioner has apparently conceded this argument by failing to address it in response to this Court's order of August 27, 1991 to brief any claim of cause and prejudice or fundamental miscarriage of justice. In any event, Spellman's failure to file a written motion for a mistrial is discussed in the record; therefore, petitioner's appellate counsel had an opportunity to raise the issue in petitioner's direct appeal or first state habeas petition. In addition, there is no possibility of a fundamental miscarriage of justice occurring here. Accordingly, the Court finds no basis for reconsidering its earlier ruling that this issue is procedurally barred.

B. Request for an Evidentiary Hearing.

This Court will grant an evidentiary hearing where: (1) the facts alleged by petitioner, if true, would entitle him to relief, and (2) an evidentiary hearing is

needed to establish the truth of petitioner's allegations. See Coleman v. McCormick, 874 F.2d 1280, 1283 (9th Cir.) (en banc), cert. denied, 493 U.S. 944 (1989). The second requirement is met when "no state court trier of fact has, after a full and fair hearing, reliably found the relevant facts." Tinsley v. Borg, 895 F.2d 520, 530 (9th Cir. 1990) cert. denied, 112 L.Ed.2d 1059 (1991).

Unless otherwise discussed, the request for an evidentiary hearing on each issue discussed below is denied for the reason that the claim lacks merit. As noted above, a necessary predicate to any grant of an evidentiary hearing is that petitioner's allegations, if true, would warrant the granting of the writ. The demonstrated lack of merit to petitioner's claims preclude such a ruling from this Court.

Among Siripongs' claims are five allegations of ineffective assistance of counsel.[5] To prevail on a claim of ineffective assistance of counsel, petitioner must demonstrate that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 687 (1984).[6] To satisfy the first component, petitioner demonstrate "that counsel's representation fell below an objective standard of reasonableness." Id. at 688. In assessing these claims,

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5. After initial briefing in this matter, the Court allowed petitioner to depose his trial counsel about each allegation of ineffective assistance of counsel. After the deposition, the Court took further briefing on these issues. For the most part, trial counsel could not remember any details about his representation of petitioner.

6. Petitioner's burden is the same regardless of whether the claimed error occurred in the guilt phase or the penalty phase. Strickland, 466 U.S. at 687-88.

this Court must be highly deferential and make every effort to evaluate trial counsel's conduct from counsel's perspective at the time of the trial, rather than evaluating the performance in hindsight. Id. This Court's analysis begins with a strong presumption that trial counsel provided adequate representation and exercised reasonable professional judgment in making all significant decisions relevant to his representation of petitioner. Id. at 690.

Even if counsel's performance is found to be professionally unreasonable, such a finding will not result in reversal if counsel's error had no effect on the judgment of the case. Id. at 91. To prove prejudice, petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A

reasonable probability is one that undermines confidence in the outcome. Id. With these parameters in mind, the Court now turns to petitioner's specific claims.

1. Ineffective Assistance of Counsel: Accomplice Theory.

Petitioner first argues that his trial counsel, Spellman failed to investigate the existence of an accomplice and that this failure constituted a Strickland violation.[7] This argument fails for several reasons. First, Strickland dictates that this Court take into account petitioner's assistance, or lack thereof, in assessing counsel's decision not to conduct an investigation. 466 U.S. at 691. Petitioner, who would be

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7. When a Strickland claim focuses on counsel's failure to investigate, the reviewing court must look at the extent of the investigation and the reasonableness of the decision not to investigate. Strickland, 466 U.S. at 691. Again, when assessing reasonableness, this Court must apply a heavy measure of deference to counsel's judgment. Id.

in the best position to assist himself with this claim, has apparently remained silent. There is no evidence before this Court that petitioner ever identified an accomplice for trial counsel. Similarly, this Court is not in receipt of any declarations or other sworn statements from petitioner acknowledging that he had an accomplice. Under these circumstances, counsel's failure to investigate is hardly unreasonable.

Second, the accomplice theory itself was, and is, absurd. The crux of this "theory" is that petitioner unsuccessfully attempted to fight off the accomplice/killer; his unsuccessful "efforts" however, resulted only in his receiving relatively minor cuts on his hands. Then, after this struggle, it is petitioner -- and not the accomplice/killer -- who keeps the proceeds of the robbery. That counsel did

not attempt to pursue this facially nonsensical series of events can hardly rise to the level of a Strickland violation.

Moreover, even assuming that theory had some validity, this strategy would have seemingly necessitated the admission that petitioner was, at the very least, present during the double murders. This would negate any chance of acquittal, an outcome that trial counsel apparently felt was in his reach when he opted to attack the sufficiency of the prosecution's evidence. Spellman's decision to put the prosecution to its proof was a sound tactical decision.[8/] Accordingly, and for

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8. In fact, even if there were an accomplice, all the evidence still pointed to petitioner as the murderer: Siripongs' hand injuries were consistent with the stabbing of Nguyen; bloodstains, hair, and clothing connected with the murders were also tied to Siripongs; all of the recovered property was connected with Siripongs; Siripongs urged his girlfriend and her sister to hide the stolen property; and

all these reasons, this argument is rejected.

2. Ineffective Assistance of Counsel: Failure to Present Mitigating Evidence.

Petitioner next asserts that counsel's failure to present family and friends who would vouch for his character, psychologists who would testify about his troubled upbringing, and a Thai cultural expert who would testify about how the Thai culture contributed to petitioner's lack of demonstrable remorse constituted a Strickland violation. This Court disagrees and finds that petitioner has not satisfied either prong of the Strickland test.

Before turning to the merits of this claim, the Court must address the issue of an evidentiary hearing. A hearing is not required if the Court can resolve the

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the police investigation did not turn up any accomplices.

an evidentiary hearing. A hearing is not required if the Court can resolve the factual issues on the basis of the record before it. See e.g. Blackledge v. Allison, 431 U.S. 63, 82 n.25 (1977) (resolution of a claim on the basis of affidavits is permissible provided the factual issue does not turn on the credibility of the affiants); Bliss v. Lockhart, 891 F.2d 1335, 1338 (8th Cir. 1989) (live testimony is unnecessary absent some showing that the testimony would conflict with evidence available from the record); Matta-Ballesteros v. Henman, 896 F.2d 255, 258-59 (7th Cir. 1990) (it is proper for a judge to utilize discovery and an expansion of the record to avoid an unnecessary hearing), cert. denied, 112 L.Ed.2d 169 (1990).

On this issue, the Court finds the record to be more than adequate to allow resolution of the issue without hearing

live testimony. Petitioner submitted declarations from 16 family members and friends as part of his opposition to respondent's motion for summary judgment. Later, the Court allowed petitioner to file supplemental documents relating to this claim.[9] Petitioner responded by submitting declarations from a Thai cultural expert, a psychologist, and a Strickland expert, as well as photographs from petitioner's childhood, petitioner's school records, and examples of his artistic ability. In addition, the Court granted petitioner's request to depose his trial counsel.[10]

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9. Rule 7 of the Rules Governing § 2254 Cases allows a judge to order an expansion of the record to include such materials as documents, exhibits, and affidavits.

10. On October 3 & 4, 1991, petitioner and respondent deposed Spellman. The deposition resulted in 200-pages of transcript. For the most, Spellman was unable to recall any details regarding his representation of petitioner. The Court has no reason to

Having carefully considered each document submitted by petitioner, the Court concludes that credibility is not an issue. Which is to say, if the Court accepts as true everything submitted by petitioner in support of this claim, the Court still finds that the claim lacks merit and consequently finds no reason to hold a hearing.

The Court finds no merit because petitioner has failed to satisfy either prong of the Strickland test. First, the record amply supports a finding that trial counsel had a sound tactical reason for electing not to present the testimony of petitioner's family and friends. Spellman did not want the jury to learn that petitioner had a prior conviction for a burglary committed in Thailand. The circumstances of the prior crime --that

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believe that a hearing in open court would change Spellman's responses.

is, whether or not it contained elements of violence-- was largely irrelevant. The jury had just convicted petitioner of two murders and found that burglary and robbery were the underlying crimes. Evidence that petitioner previously participated in a burglary, even one without violence, would be extremely damning.

Spellman's inability to recall his reason for making the choices he made does not impact on this Court's assessment. The record indicates that Spellman intended to call petitioner's mother, his girlfriend, and members of his girlfriend's family as witnesses at the penalty phase. The record further demonstrates that Spellman decided not to call the aforementioned witnesses because he could not obtain a definitive ruling from the trial judge about what testimony would open the door

for the prosecution to impeach or rebut with evidence of petitioner's involvement in the burglary in Thailand. The obvious inference related to the failure to call these witnesses, indeed the only logical inference, is that Spellman did not want the burglary conviction to be presented to the jury under any circumstances.

The validity of such a trial strategy has been affirmed by a number of courts. For example, in Burger v. Kemp, 483 U.S. 776, 792-793 (1987), the Court found no ineffective assistance of counsel when the attorney failed to present any mitigating evidence at the penalty phase. The Court concluded that it was reasonable for the attorney to forgo presenting witnesses who would have testified about the defendant's exceptionally unhappy and often violent childhood because such testimony might have opened the door to the admission of

evidence showing that defendant did not have a spotless criminal record. Id.[11] Similarly, the Supreme Court found no ineffective assistance of counsel when an attorney opted not to present "humanizing" evidence in order to keep out evidence harmful to the defendant. See Strickland v. Washington, 466 U.S. 668, 699-700 (1984).

On the basis of the record and the case law, the Court finds that Spellman made a valid tactical decision that the risk of the jury learning about the burglary conviction outweighed the benefit of testimony from petitioner's mother and friends. Furthermore, from this Court's perspective, Spellman made the only choice that left open the possibility of a

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11. The Court notes that the federal district court in Burger relied, at least in part, on affidavits in finding no merit to the ineffective assistance of counsel claim. 483 U.S. at 793-94.

sentence other than death. That the strategy proved unsuccessful does not make the decision Constitutionally defective.[12/]

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12. Two recent Ninth Circuit death penalty cases do not dictate different results. In Hendricks v. Vasquez, 92 Daily Journal D.A.R. 12256, 12261 (9th Cir. September 2, 1992), the court remanded for an evidentiary hearing on the petitioner's ineffective assistance of counsel claims. In doing so, the court opined that "the best way to determine the reasons for counsel's actions would be to hold an evidentiary hearing and ask counsel." Id. As discussed above, an evidentiary hearing is not necessary in this case for two reasons: petitioner deposed his trial counsel and lodged copies of the deposition transcripts with the Court and, more importantly, trial counsel's reasoning was set forth in the trial record.

Similarly, Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), does not alter this Court's conclusions. In Mak, the appellate panel affirmed the granting of a writ based on ineffective assistance of counsel at the penalty phase. The court stressed, however, that the basis for doing so was counsel's lack of tactical evaluation in opting not to present humanizing evidence. Id. at 618-619. Indeed, trial counsel in Mak admitted there was no downside to presenting the available mitigating evidence since it would not have opened the door to damaging rebuttal evidence. Id. In contrast, Spellman made a tactical decision in this case not to

In any event, even if petitioner could establish a Constitutional deficiency, he has failed to demonstrate a reasonable probability that the outcome of the penalty phase would have been different had Spellman presented the mitigating evidence available to him. There would have been virtually no way for Spellman to present the type of humanizing evidence desired by petitioner without opening the door to impeachment or rebuttal about petitioner's prior crime.[13/] In fact, any attempt to do so would have been made even more difficult because the potential witnesses were all Thai nationals to whom the penalty phase

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present certain humanizing evidence because of the risk that the jury would learn of Siripongs' prior burglary conviction.

13. Of the 16 declarants offered by petitioner, eight knew about petitioner's involvement in the burglary, including all but one of the declarants who were related to petitioner through blood or marriage.

proceedings would have been particularly daunting. No amount of pre-trial preparation of the witnesses regarding the avoidance of this subject would have diminished the possibility of the burglary evidence being inadvertently presented to the jury.

Thus, in assessing the probability of a different verdict, the Court must factor in, not only the mitigating evidence which could have been presented, but also the impact of the jury learning of the very damaging burglary evidence. The Court has no doubt that the burglary evidence would have been admissible and would have been extremely probative, if not determinative, in assessing the proper sentence. Evidence about the burglary would let the jury know, not only that petitioner failed to be rehabilitated, but that he later committed another burglary in a particularly vicious and violent manner.

The synergy between the two crimes is inescapable.

On the other hand, the Court finds the potential mitigating evidence to be utterly unmoving. While the evidence would allow the jury to "know" petitioner, it hardly compels a different verdict. In a relative sense, petitioner's childhood and upbringing, while difficult at times, were neither particularly deprived, nor abusive. Similarly, the inclusion of the exhibits --the photographs, school records, and drawings[14]-- would have no meaning unless presented in the context of describing petitioner's life, a strategy which, once again, would have the significant potential of allowing the

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14. Petitioner also submitted copies of petitioner's institutional progress reports from San Quentin prison. The Court will not consider those documents, however, since they refer to behave that occurred long after the penalty phase concluded.

prosecution to present evidence concerning petitioner's burglary conviction.

The Court believes that the testimony of the psychologist would have invited rebuttal evidence of petitioner's burglary conviction since the burglary evidence contrasts starkly with the view of petitioner that the psychologist would have presented.

As for the testimony of a Thai cultural expert, the Court again finds nothing in the declaration which would carry the day for petitioner. At best, the expert could provide a lecture on generalities about Thai culture. The information presented in the declaration is rather generic and could be adapted to any Thai national. Indeed, the only real tie to Siripongs focuses on petitioner's status as a mere accomplice who did not participate in the murders --a theory rejected by this Court and inconsistent

with the overwhelming evidence presented at trial.

In sum, the humanizing evidence, coupled with the psychological and cultural testimony, would hardly begin to counterbalance petitioner's prior involvement in a burglary and the particularly aggravating circumstances of the crimes in issue -- the premeditation (e.g. arranging in advance to call in sick at work), the violence, and the post-murder arrogance of using the victims' credit cards to buy Christmas presents. The Court is confident in its view that there is no reasonable probability that the penalty phase envisioned by petitioner would lead to a different sentence.

3. Ineffective Assistance of Counsel: Functional Equivalent of Interrogation Issue.

Petitioner next contends that Spellman rendered ineffective assistance of counsel at the motion to suppress the tape-recording of petitioner's telephone call. Specifically, petitioner argues that Spellman failed to present information contained in police reports that was available to him which would have substantiated a claim that petitioner was subject to the functional equivalent of interrogation.

The Court finds no merit to this claim. Petitioner has failed to present to the Court any indication or proffer of what the police reports say, nor has petitioner submitted the reports to the Court for its review. Having reviewed the transcripts of the motion to suppress, the Court finds that the public defender

who presented petitioner's motion to suppress[15/] extensively argued that the police circumvented petitioner's desire to speak to an attorney before allowing him to use the telephone. Since petitioner has failed to show the Court what more the attorney could have done, the Court rejects this claim.

4. Ineffective Assistance of Counsel: Failure to Investigate Criminal Conviction in Thailand.

Petitioner next contends that Spellman's failure to investigate Siripongs' criminal conviction in Thailand constituted ineffective assistance of counsel because it left Spellman unaware of the non-violent nature of the offense. The Court holds that further investigation by Spellman was irrelevant in light of the

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15. Petitioner was represented by a different public defender at the motion to suppress, though Spellman attended the hearing.

judge's ruling that the offense was non-violent.[16/] The trial judge specifically ruled that testimony about petitioner's non-violent nature would not open the door to impeachment or rebuttal about the burglary offense.

As discussed in issue 3 above, Spellman made a tactical decision to avoid any possibility that the jury would learn of petitioner's prior criminal activity. Given the judge's ruling, it is apparent that Spellman's decision did not turn on the nature of the offense, but rather that the offense occurred and would be damaging to petitioner if the jury learned about it.

5. Juror Misconduct.

Petitioner next asserts that the trial court failed to conduct a

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16. Moreover, it was Spellman who persuaded the trial court that the offense in question was a burglary and not a robbery as the prosecutor had contended.

Constitutionally adequate hearing on an allegation of juror misconduct. The alleged juror misconduct occurred when the mother of one the jurors asked an attorney uninvolved in petitioner's case about the significance of a cleared-off defense table.[17] The judge denied Spellman's motion for a mistrial based upon insufficient information, but agreed with Spellman's request that the court have an in camera meeting with the juror to ascertain the extent of the communication between the juror, the mother, and the attorney. After talking with the juror in camera, the court determined that no misconduct had occurred.[18]

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17. The juror apparently had mentioned to her mother that the defense had cleared off its table at the conclusion of the prosecution's case-in-chief and she wondered about the significance of the defense having done so.

18. Since, as discussed below, the Court finds no infirmity with the trial court's hearing, the Court adopts the

Petitioner now contends that the ex parte, in camera hearing between the judge and juror was unConstitutional. This Court disagrees. A trial judge has broad discretion in deciding how to investigate an allegation of juror misconduct. See United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir.), cert. denied, 434 U.S. 818 (1977). Moreover, "the mere occurrence of an ex parte communication between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror. . . . " United States v.Gagnon,

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trial court's findings regarding the lack of misconduct. See 28 U.S.C. S 2254(d). Accordingly, the Court also rejects on the merits petitioner's procedurally barred claim alleging ineffective assistance of counsel for failure to file a written motion for mistrial based on juror misconduct. If no misconduct occurred, then petitioner was not prejudiced by Spellman's omission.

470 U.S. 522, 526 (1985) (per curiam), quoting Rushen v. Spain., 464 U.S. 114, 125-126 (1983) (Stevens, J., concurring in the judgment).

In this case, the judge briefly questioned the juror about the allegations, obtained her assurances that the information from the attorney played no role in the jury's deliberations, and strongly admonished her about further communication about the case.[19/] Under these circumstances, the Court finds that the meeting between the judge and the juror did not violate the Constitution.

In addition, the Court notes that defense counsel himself requested this procedure, rendering it invited error. See United States v. Ahmad, 92 Daily Journal D.A.R. 12558, 12559 (9th Cir.

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19. The meeting between the judge and juror was recorded. The court unsealed the transcript at the conclusion of the case. This Court has read the transcript.

September 9, 1992). An invited error will lead to reversal only if reversal is "necessary to preserve the integrity of the judicial process or prevent a miscarriage of justice." Id., (citation omitted). Neither exception is present in this case.

6. Prosecutorial Intimidation.

Petitioner claims error with the trial court's refusal to hold a hearing on his allegation of prosecutorial intimidation of two potential penalty phase witnesses. During the penalty phase, Spellman made an offer of proof that the prosecutor had spoken with petitioner's girlfriend and her sister and accused them of withholding information. The trial Judge responded that he also believed the two witnesses knew more than they were telling. The trial court accepted Spellman's offer of proof, but declined his request to take testimony

from the witnesses' stepfather, who apparently overheard the prosecutor's conversation.

Like the trial judge, this Court does not believe that defense counsel's proffer that the prosecutor accused petitioner's girlfriend and her sister of withholding information in any way indicates that the two witnesses were "threatened" by the prosecutor. And even if there was a "threat," there is still no Constitutional error. Prosecutorial misconduct violates the Constitution only if it affects the fundamental fairness of a trial. See Smith v. Phillips, 455 U.S. 209, 219 (1982). Here, even assuming the prosecutor made some "threatening" remarks to the witnesses, there is absolutely no evidence that Spellman chose not to call them to testify at the penalty phase as a result of the prosecutor's actions. Instead, as discussed in issue 3 above,

all of the evidence indicates that Spellman did not call the witnesses because he feared the prosecutor's cross-examination and rebuttal evidence. Furthermore, there was great risk associated with exposing these two women to cross-examination. Their complicity, while it may not have been subject to prosecute, is apparent to this reviewing Court. Accordingly, this claim is also rejected.[20/]

7. Prosecutor's Comments Regarding Victim Impact.

Petitioner next argues that his Constitutional rights were violated when the prosecutor urged the jury to consider

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20. Relatedly, this Court also rejects petitioner's claim that the prosecutor's misinterpretation of petitioner's Thai rap sheet, which occurred entirely out of the presence of the jury, somehow prejudiced his trial. This is especially true since the trial court rejected the prosecutor's contention that the burglary was a violent crime.

irrelevant factors such as the victim's characteristics and the impact of the murders on the surviving family members.

This Court's review of the prosecutor's comments reveals no errors warranting reversal. The law regarding the use of victim impact testimony has undergone significant change in the past few years. In 1987, the United States Supreme Court prohibited the introduction of formal "victim impact statements" at the penalty phase. See Booth v. Maryland, 482 U.S. 496 (1987). The Court expanded this prohibition in South Carolina v. Gathers, 490 U.S. 805, 810-811 (1989), when it barred a prosecutor from discussing the personal characteristics of the victim at the sentencing portion of a capital trial. Two years later, the Court overturned both Booth and Gathers and ruled that a prosecutor may introduce evidence concerning the impact of the

crime on the victim and the victim's family. See Payne v. Tennessee, 115 L.Ed.2d 1110 (1991).

The Court need not consider whether Booth, Gathers, or Payne apply to petitioner's trial, which was held in 1983, because the Court finds that the prosecutor's comments did not violate Booth or Gathers.[21/] During the guilt phase, the prosecutor did not elicit any improper comments about the personal characteristics of the victims. Furthermore, in closing argument, the

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21. Of significance, the California Supreme Court has ruled that § 190.3(a), which allows the penalty phase jury to consider the circumstances of the crime, includes consideration of the impact of the crime on the victim's family. See People v. Edwards, 54 Cal.3d 787, 834 (1991). In reaching this conclusion, the opinion relied, in part, on a pre-Booth case that allowed testimony about the suffering of the victim and the victim's family. Id., citing People v. Haskett, 30 Cal.3d 841 (1982). Accordingly, the prosecutor's comments in this case would have been found acceptable under pre-Booth California case law.

prosecutor never specified what impact, if any, the murders had on the victims' families. Instead, he suggested that the jury consider the impact and then dropped that line of argument. Any error in the prosecutor's argument was remedied by the court's instructions to the jury. The trial judge reminded the jury that the arguments of counsel were not evidence and told the jury to consider only the specified factors in reaching its sentencing decision. Impact of the crime was not a specified factor.

In sum, the Court finds no merit to this claim.

8. Use of False and Unproven Testimony at Sentencing.

Lastly, Petitioner contends that the trial judge improperly considered false and unproven testimony in petitioner's probation report and unsworn testimony of the victims' families in rejecting

petitioner's motion for modification of sentence. This Court disagrees.

A review of the record indicates that this claim is without merit. In stating his reasons for denying petitioner's motion to modify sentence, the trial judge carefully and articulately reviewed the evidence presented at trial. Not once did the judge mention any information contained in the probation report in either its original or excised form.[22/] Similarly, after allowing members of the victims' families to address the court, the judge stated that he was not considering the testimony of the family members concerning petitioner's prior criminal record in Thailand-- precisely the testimony to which petitioner objects.

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22. Prior to the hearing on the motion to modify sentence, Spellman successfully challenged the inclusion of unsubstantiated allegations in the probation report. The Court excised a number of these prejudicial allegations.

Accordingly, and for both these reasons, this claim is rejected.

C. Motion for Summary Judgment.

1. Inadmissible Evidence: Contents of Siripongs' Wallet.

Petitioner argues that the removal and search of his wallet violated his right to be free from unreasonable search and seizure. Petitioner litigated this Fourth Amendment claim at a pre-trial suppression hearing. Fourth Amendment claims which are fully litigated in state court may not be challenged in federal habeas corpus action. See Stone v. Powell, 428 U.S. 465, 481-82 (1976). A motion to suppress hearing in state court provides an opportunity to fully and fairly litigate a Fourth Amendment claim. See Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir. 1990). Therefore, petitioner's claim is not cognizable in this federal habeas action.

2. Inadmissible Evidence: Contents of Siripongs' Automobile.

Petitioner next claims that his statement to the Westminster Police regarding the location of his car occurred as the result of the functional equivalent of interrogation. Therefore, petitioner asserts, any statements he made were in violation of his Miranda rights.

Whether the functional equivalent of interrogation has taken place is a mixed question of fact and law. See Endress v. Dugger, 880 F.2d 1244, 1249 (11th Cir. 1989), cert. denied, 495 U.S. 904 (1990). In making this determination, this Court must decide whether the police knew, or should have known, that their words were "reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Here, the Court believes that petitioner's statements to Officer Upstill of the Westminster Police Department did constitute the functional equivalent of interrogation. Officer Upstill testified that when he asked petitioner if he would like the police to secure his car, he knew it was a practice which often helped produce additional incriminating evidence. In fact, when Officer Upstill reached the car, he did not even hand petitioner the photograph of his girlfriend which petitioner had requested Upstill to retrieve. Instead, Upstill immediately pocketed the photo as potential evidence. Under these circumstances, the Court believes that the police reasonably should have known that Siripongs would incriminate himself.

This finding, however, does not end the Court's inquiry. Evidence produced in further briefing on this issue indicates

that the location -- and contents -- of Siripongs' automobile would have been inevitably discovered. See Nix v. Williams, 467 U.S. 431, 443 (1984) (evidence which would have been inevitably discovered is admissible even if illegally seized). In particular, the Garden Grove Police intended to arrest Siripongs for murder after seeing the contents of his wallet and his bandaged hands (i.e. before they knew of the items in his car). Siripongs had car keys in his pockets and the police could reasonably have surmised that he drove to the mall.[23/]

Declarations by the police further indicate that having placed petitioner under arrest, they would have immediately contacted the Department of Motor Vehicles

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23. Even if the keys were not in Siripongs' pocket, the inference that he drove to the mall was obvious: the mall was several miles from his home and petitioner was arrested attempting to purchase a television set.

("DMV") to ascertain, if possible, the make, model and license number of the car.[24] Since the car was registered in Siripongs' name, this procedure would have taken little time. Either that evening, or that night when the mall parking lot was empty, the police would have discovered Siripongs' car and impounded it.[25] In short, the seizure of the car and its contents was inevitable. On this basis, petitioner's argument is rejected.[26]

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24. Indeed, the police did contact the DMV at 6:44 p.m., the day of petitioner's arrest.

25. At best, Siripongs can argue that his girlfriend and her sister -- whom he called that night -- would have retrieved the automobile before the police. However, the evidence indicates that their mother would not let them leave the house that night. Certainly the police would have found and seized the car the following morning.

26. Furthermore, it appears that the evidence uncovered from petitioner's car did not lead to the discovery of additional evidence. Consequently, even

3. Inadmissible Evidence: Statement to Westminster Police.

While Officer Upstill was searching through petitioner's wallet for a card containing petitioner's name -- a procedure which petitioner requested -- Officer Upstill flipped past a number of credit cards with the name "Wattanaporn." At the fifth card, which bore the name Behrooz Nikkou, petitioner suddenly exclaimed, "Sir, I did not steal that card. It come in the mail to my house. I keep the card. Sir, that card I no steal." Petitioner now argues that this spontaneous statement was the result of the functional equivalent of interrogation.[27]

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were this evidence excluded, there remains overwhelming independent evidence of petitioner's guilt.

27. Petitioner contests this factual scenario, arguing instead that Officer Upstill pulled the card out and showed it to Siripongs. Both the trial court and the California Supreme Court, however, found that Officer Upstill did

Simply stated, this argument is of no moment. Officer Upstill did nothing to encourage or elicit petitioner's exclamation. As such, it clearly did not constitute the functional equivalent of interrogation. See United States v. Washington, 431 U.S. 181, 187 (1977) ("far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable"). Accordingly, this claim is rejected.

4. Inadmissible Evidence: Jailhouse Telephone Call.

Petitioner makes a number of arguments about the tape-recording of his jailhouse telephone call. While petitioner was at the police station, he placed a telephone call to his girlfriend

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Officer Upstill did not show that card to petitioner. This finding of historical fact is presumed to be correct. See 28 U.S.C. § 2254 (d); Sumner v. Mata, 449 U.S. 539, 544-47 (1981). This Court sees no reason to disturb that finding.

and her sister, instructing them to go to his apartment and retrieve the incriminating evidence located there. The call was made from a public phone, with a police officer standing in plain sight less than three feet away. A good-size television camera was suspended from the ceiling about eight feet from the telephone and was pointed towards the phone. While on the phone, petitioner spoke in Thai. The police investigator, who instructed the nearby officer to tape-record petitioner's conversation, later had the tape translated into English. The information from the conversation was relayed to the police officers who were searching petitioner's residence. The officers used the information to recover evidence from the apartment.

Petitioner contends that taping his conversation violated his right to remain

silent, his right to counsel, and the anti-eavesdropping provisions of 18 U.S.C. §§ 2510-2521.

Like the California Supreme Court, this Court rejects petitioner's claim that during the telephone call he had an actual expectation of privacy and that this expectation was reasonable, two necessary prerequisites for invoking 18 U.S.C. §§ 2510-2521. See In the Matter of John Doe Trader Number One, 894 F.2d 240, 242 (7th Cir. 1990) (setting forth these criteria). First, the setting -- the police station, the camera, and the presence of a police officer -- belies any contention that the phone conversation would be private. Second, petitioner's conduct in speaking Thai during the conversation indicates that he realized the call was not private. Third, any expectation that the officer did not speak Thai, as a matter of law, was

unreasonable. See People v. Bazaure, 235 Cal.App.2d 21, 34, 44 Cal. Rptr. 831 (1965) (rejecting same claim when two defendants spoke in Spanish). Surely petitioner's privacy expectation should not turn on his gamble about the foreign language fluency of the nearby officer.

Indeed, this claim is no different than one stating that petitioner believed no one could overhear his comments-- a claim which the courts have consistently rejected. See United States v. McLeod, 493 F.2d 1186, 1188 (7th Cir. 1974); Doe Trader, 894 F.2d at 243. This Court does so also.

Petitioner also argues that the recording of his telephone call violated his right to counsel. The state court determined that no adversarial proceedings had been initiated at the time of the phone call. Siripongs, 247 Cal. Rptr. at 737. Petitioner has not provided the

court with any legal authority supporting an argument that the making of a telephone call in a jail setting is a critical stage triggering the right to counsel. The fact that Siripongs had previously requested an attorney is irrelevant to this argument since allowing Siripongs to make a telephone call did not constitute interrogation.[28/]

Finally, petitioner argues that the police should not have been allowed to obtain and use the telephone number he called. This argument fails to recognize that the police are entitled to take safety precautions in allowing inmates to use the telephone. Certainly obtaining the phone number before a call is placed is a reasonable and not overly intrusive means of assuring safety. Furthermore,

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28. Indeed, the Court rejects both the Sixth Amendment and Fifth Amendment claims for the reason that petitioner's telephone call did not constitute police interrogation.

the officer stood some three feet away from Siripongs during the telephone call; therefore the number would have been apparent had the officer let Siripongs dial the number himself. Also, the translation of the conversation made it immediately apparent who Siripongs was talking with during the conversation.

In conclusion, petitioner has not demonstrated any error in the use of the phone number and phone conversation.

5. Jury Selection.

Petitioner next argues that the court applied an improper legal standard in determining whether a juror's bias in favor of the death penalty disqualified him or her from service. In particular, petitioner takes exception to the trial court's use of the "unmistakably clear" standard to determine whether a juror was impermissibly biased towards death. The court, Siripongs asserts, compounded this

error by failing to ask the jurors whether they could set aside their personal views and follow the law. According to petitioner, these errors resulted in a biased jury panel.

The Supreme Court looked at challenges for cause in capital cases in Witherspoon v. Illinois, 391 U.S. 510 (1968). The Witherspoon court did not articulate a standard for weighing a challenge for cause, but rather stated in a footnote that a proper jury would be one which excluded only those jurors who made it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial . . . or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Id. at 522 n.21. (Emphasis in original).

The Court later revisited the issue of challenges for cause. In Wainwright v. Witt, 469 U.S. 412 (1985), the Court retreated from the standard suggested in Witherspoon and instead specified that the proper standard to apply was whether "the juror's views on capital punishment would `prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'" Id at 424, quoting, Adams v. Texas, 448 U.S. 38, 45 (1980).[29/]

The Court applied the Witt standard in a case somewhat analogous to petitioner's situation. See Ross v. Oklahoma, 487 U.S. 81 (1988). In Ross, the trial court erroneously applied the Witt standard and denied a challenge for cause. Consequently, the defendant

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29. Petitioner's trial took place two years before Witt. The Supreme Court, however, has applied the Witt standard retroactively. See Darden v. Wainwright, 477 U.S. 168, 175 (1986).

exercised a peremptory challenge to remove the juror in question. Unlike this case where Siripongs used only 16 of 26 peremptory challenges, the defendant in Ross ultimately used all of his peremptory challenges. On appeal, the defendant argued that the trial court's error in not excusing the juror for cause violated his right to an impartial jury. Id. at 85.

The Supreme Court rejected these arguments finding that a claim of jury impartiality must focus on the twelve jurors who actually sat on the panel. Id. at 86. None of the twelve jurors in Ross were challenged for cause and the defendant never alleged that a seated juror was biased. On these facts, the Court concluded that the defendant failed to establish jury impartiality. Id.[30/]

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30. The defendant in Ross also argued that had he not had to exercise his peremptory to remove a juror who should have been removed for cause, he might have used his peremptory on one of

This Court need not resolve the question of whether the trail judge applied the correct standard for rejecting venirepersons for cause because the court's actions had no practical effect. Like Ross, Siripongs does not allege that any member of his jury was impartial. Moreover, Siripongs accepted the composition of his jury while he still had ten peremptory challenges remaining. Thus, if any error occurred in selecting a jury for Siripongs' trial, it was not of Constitutional proportion. Accordingly, this claim must fail.

6. Jury Instructions.

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the seated jurors and ended up with a jury of a different composition. While acknowledging the truth of the argument, the Court nevertheless held that the possibility of a different jury does not mandate reversal. 487 U.S. at 89. Indeed, the Court observed that "the statement that any error which affects the composition of the jury must result in reversal defies literal application." Id. at 89 n.2.

Petitioner also raises a number of challenges to his jury instructions, all of which are without merit. First, petitioner argues that ambiguities in the language of CALJIC No. 8.84.1(b) allowed the penalty phase jury to double-count petitioner's violent conduct under both factor (a) and factor (b). Petitioner further contends that the prosecutor's closing argument encouraged an improper interpretation of factor (b).

The court first notes that the language of CALJIC No. 8.84.1, taken verbatim from California Penal Code § 190.3, has been found to comport with the Constitution. See e.g. Pulley v. Harris, 465 U.S. 37, 51-52 (1984) (citing the provisions of § 190.3 as one of the key features which keeps California's death penalty scheme from being unconstitutionally arbitrary); California v. Brown, 479 U.S. 538, 540 (1987)

(approving of the statutory scheme set forth in § 190.3).

More importantly, based on the record, there is little likelihood that the jury applied instruction No. 8.84.1 in the wrong matter. The judge, the prosecutor, and the defense attorney mentioned to the jury that Siripongs had no prior history of violence. Moreover, each of these persons correctly stated to the jury that lack of past violence can be considered a mitigating factor. When this information is considered along with instruction No. 8.84.1, any possibility of an erroneous interpretation of 8.84.1(b) is minimal, at best.

In fact, the prosecutor's argument was consistent with the correct interpretation of CALJIC No. 8.84.1. The prosecutor told the jury to consider Siripongs' actions during the crimes for which he was convicted (appropriate under

section (a)). In addition, he noted that Siripongs' non-violent history could be considered a mitigating factor (appropriate under section (b)). Thus, the prosecutor's argument was not only not misleading, but it actually may have cleared up any ambiguity arising from the instructions.

Second, petitioner claims that the trial court's failure to delete inapplicable mitigating factors allowed the jury to consider the absence of mitigating factors to be aggravating. Moreover, he argues that the problems inherent in the instructions were magnified by the prosecutor's reliance on the lack of mitigating factors to argue that the jury should return a death verdict.

Petitioner's contentions must fail. The court's instructions explicitly stated that the factors were to be considered

only if applicable. While the court could have more affirmatively stated that the absence of mitigation is not aggravating, the court's vagueness in stating that the absence of mitigation "does not necessarily constitute" aggravation does not amount to Constitutional error.

Furthermore, when viewed in the context of the record, the prosecutor's argument did not further any possible misunderstanding about the meaning of the instructions. The prosecutor stressed that several mitigating factors were not present. The thrust of his argument, however, was that these factors could not help petitioner. This argument is correct. The jury was instructed to weigh aggravating and mitigating factors. Obviously, the lack of some areas of mitigation meant that the defendant had less to weigh against those factors that were aggravating. It does not mean, as

petitioner would have the Court believe, that the jury decided the absence of certain factors became aggravating factors.

Third, petitioner believes that the court's instruction, CALJIC No. 8.84.1(k), improperly restricted the jury from considering evidence in mitigation that was unrelated to the crime, such as sympathy and compassion. CALJIC NO. 8.84.1(k), has been upheld by the United States Supreme Court. See Boyde v. California, 494 U.S. 370, 376 (1990). Moreover, the trial judge explicitly told the jury, "You may consider pity, sympathy, and mercy for the defendant in deciding the appropriate penalty." Accordingly, this claim is of no moment.

Fourth, petitioner asserts that the trial judge failed to adequately apprise the jury of its discretion in imposing the death penalty. The instruction the trial

judge gave (CALJIC No. 8.84.2) was also upheld by the Supreme Court in Boyde. Id. In addition, the trial judge went beyond CALJIC 8.84.2 and told the jury that their consideration of the applicable factors was not mechanical and stated, "You are not merely to count up the number of circumstances on each side." For these reasons, this argument also fails.

Fifth, petitioner contends that the judge was required to give three instructions: (1) that each aggravating factor be proved beyond a reasonable doubt; (2) that aggravating factors must outweigh mitigating factors beyond a reasonable doubt; and (3) that petitioner's convictions at the guilt phase cannot be used as aggravating factors. All of these arguments are unpersuasive.

Because aggravating factors are employed following conviction, they are

merely sentencing factors. Hildwin v. Florida, 490 U.S. 638, 640 (1989). As such, they need only be proven by a preponderance of the evidence. See United States v. Restrepo, 946 F.2d 654, 656 (9th Cir. 1991) (en banc), cert. denied, 118 L.Ed.2d 211 (1992).[31]

The Ninth Circuit has rejected the argument that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt. Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir. 1982), reversed on other grounds, 465 U.S. 37 (1984); see also Ford v. Strickland, 696 F.2d 804, 817-818 (11th Cir.) (en banc), cert. denied, 464 U.S. 865 (1983) (rejecting same claim). In also rejecting

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31. This Court also rejects petitioner's claim that the jury had to find the existence of each aggravating factor unanimously. That necessarily occurred here since the sole aggravating factors were the circumstances of the crime, to which the jury unanimously agreed.

this claim, this Court observes, as the Ford court did, that the weighing of evidence is not susceptible to a standard of proof.

Lastly, this Court, like the California Supreme Court, rejects petitioner's claim that CALJIC 8.84.1(a) allowed the jury to consider his convictions, standing alone, as aggravating factors. See Siripongs, 247 Cal. Rptr. at 748 n.11. Instead, that instruction states that the circumstances of the crimes can be considered as aggravating factors, something which is entirely proper. Id. Accordingly, this claim is also rejected.

7. Consideration of Extrajudicial Comments; Constitutionality of California's Death Penalty Scheme.

Petitioner next argues that the trial judge erred by failing to consider his pre-trial letter expressing remorse and

requesting an automatic death sentence. There is no evidence in the record that this letter was ever received. Regardless, under California law, the trial judge could not consider this when determining whether to modify petitioner's sentence. See Cal. Penal Code § 190.4(e) (trial judge may only consider evidence which was before jury).[32] To the extent this argument, and petitioner's other arguments, challenge the Constitutionality of California's death penalty scheme, those claims are also rejected. See Pulley v. Harris, 465 U.S. 37, 51 (1984)[33].

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32. The Court also rejects petitioner's arguments that Spellman's failure to bring this evidence forward at the trial constituted ineffective assistance of counsel. This evidence was highly damning and was contrary to his claim that he was not guilty.

33. Harris dealt with the 1977 death penalty statute. Siripongs was sentenced under the 1978 death penalty statute. The differences between the two statutes, however, do not involve §

Finally, this Court also rejects petitioner's claim that the review process employed by the California Supreme Court -- namely its failure to apply proportionality review -- violates his equal protection rights. See Pulley, 465 U.S. at 51-2 (rejecting same claim).[34/] In any event, the California Supreme Court did a comparative review of petitioner's sentence. After finding no merit to petitioner's claim that he was entitled to comparative sentence review, the California Supreme Court made the following observation:

> "[T]here is no merit in any assertion that the punishment prescribed for the offense in question [here,

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190.4(e).

34. Proportionality review encompasses comparing petitioner's punishment with that given in other murder cases.

> burglary-robbery-double-murder] is more severe than that prescribed for less serious crimes, or that the death penalty for defendant's crime is disproportionate to the punishment prescribed for the same offense in other jurisdictions." [Citation omitted]. Nor, in light of the facts of this case, can defendant credibly assert the punishment imposed is disproportionate to his individual culpability.

People v. Siripongs, 247 Cal. Rptr. 729, 751 (1988). Therefore, this claim is rejected.

IV. CONCLUSION

For the reasons stated above, petitioner's motion for evidentiary hearing is DENIED, respondent's motion for

summary judgment is GRANTED, and petitioner's writ is DENIED.

This Order constitutes a final disposition of this petition by the Court. Accordingly, the stay of execution previously granted by the Court is now vacated. If petitioner applies for a certificate of probable cause and the certificate is granted, the Court will grant another stay of execution which will remain in effect until the Court of Appeals acts upon the appeal or the order to stay the execution. See Local Rule 26.8.7(f).

IT IS SO ORDERED.

DATED: October 21, 1992

/s/
William D. Keller, Judge
United States District Court